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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IN RE:

MARSHALL P. SAFIR,

Petitioner,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Whether a federal judge should have disqualified himself under the "reasonable observer" standard of 28 U.S.C. § 455(a) when his appointment to the bench was by sponsorship of the chairman of a Judicial Selection Committee, whose own political patron, contemporaneous with the federal appointment, had been personally involved in a long standing conspiracy to defeat the petitioner in the maritime suit at bar on evidence judicially determined to already be in the hands of the government.

Whether the factual basis of this special relationship, discovered six years after the judge enjoined petitioner from unfettered access to further legal process, permeated the entire litigation with such prejudice and bias that the judge's failure to recuse himself warrants disqualification and vacation of injunctive restraints in the Second Circuit.

Where there is a conflict between the Circuits, whether disqualification is warranted under 28 U.S.C. § 455(a), regardless of whether the prejudice came from an extra-judicial source (§ 455(b)(1)) or the prejudice was explicit in word and action taken as a result of judicially acquired information.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HEARING

OPINIONS BELOW

The Order of the Court of Appeals in Docket CA-91-8010 of February 28, 1991 denying leave to file a Petition for Writ of Mandamus to District Judge Eugene Nickerson (A1-A2); the Order of the Court of Appeals of August 12, 1987 is appended at pp. 86a-90a; the Order and Memorandum of the Court of Appeals March 24, 1988, pp. 91a-92a.

Other relevant opinions include *Safir v. U.S. Lines, et al.*, 792 F.2d 19 (2nd Cir. 1986) *cert. denied*, 479 U.S. 1099 (1987); *Safir v. United States Lines, et al.*, 616 F.Supp. 613 (EDNY 1985); *Safir v. Dole*, 718 F.2d 475 (D.C. Cir. 1983) *cert. denied*, 467 U.S. 1026 (1984) *rehearing denied*, 467 U.S. 1268 (1984); *Safir v. Klutznick*, 526 F.Supp. 921 (D.D.C. 1981); *In Re Marshall P. Safir*, 108 S.Ct. 496 (1987); *In Re Marshall P. Safir*, 108 S.Ct. 788 (1988); *Safir v. ICC & CSX Corp.*, 831 F.2d 283 (2nd Cir. 1987) *cert. denied*, 109 S.Ct. 520

(1988), and *In Re American President Lines, Inc.*, 804 F.2d 1304 (D.C. Cir. 1986).

JURISDICTON

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment below was entered on February 28, 1991, the mandate issued on March 4, 1991.

STATUTES INVOLVED

28 U.S.C. § 455(a) and 455(b)(1)
31 U.S.C. § 232
11 U.S.C. § 303(b)
49 U.S.C. § 11321(b)

STATEMENT OF THE CASE

On February 28, 1991, the Court of Appeals for the Second Circuit (Oakes, C.J., Lumbard, Senior Judge and Cardamone, J.) denied a motion for leave to file a Petition for Writ of Mandamus to Federal District Court Judge Eugene H. Nickerson (EDNY) (A1,2).

The motion was for vacatur of an injunction against petitioner's unfettered access to the district court and for recusal of the presiding judge thereafter based on newly discovered evidence that the judge's impartiality was reasonably subject to question and thus violative of 28 U.S.C. § 455(a). The motion was supported by the affidavit of Marshall P. Safir. Moreover, as grounds for vacatur of the injunction, the evidence showed that the judge had a personal bias concerning this petitioner which sprang from an extra judicial source violative of § 455(b)(1) and that the record over the past six years bears this out as well.

The motion complied with a preliminary injunction of August 12, 1987 (A-86) ordered by the Second Circuit and made final by Order of March 24, 1988. The Order of March 24, 1988 (A-91) was the outgrowth of the District Court injunction in *Safir v. U.S. Lines, et al.*, 616 F. Supp. 613 (1985 EDNY Nickerson, J.), as modified and affirmed 792 F.2d 19 (2d Cir. 1986), *cert. denied* 479 U.S. 1099 (1987).

The Second Circuit had modified the District Court injunction in 1986 so as not to foreclose access by permission of the district court for leave to file new claims of merit. *Safir v. U.S. Lines, et al.*, 792 F.2d at p. 25.[1] However, since 1987, the district court judge has either denied leave to file such new contract claims or, having permitted their filing, has not allowed the suit to proceed or to be amended with maritime lien claims.

This Court has been aware of the nature of these maritime contract claims against the ship line defendants and against others, where necessary to protect their dissipation, in civil, admiralty and bankruptcy contexts; *cf.* Supreme Court Dockets 86-6137 *cert. denied* 479 U.S. 1099 (1987); 87-5789 *cert. denied* 109 S.Ct. 496, 788 (1987); 87-7222 *cert. denied* 109 U.S. 520 (1988); 89-652 *cert. denied* 110 S.Ct. 505 (1990); 89-953 *cert. denied* 110 S.Ct. 1121 (1990)); 89-1301, 110 S.Ct. 1482 (1990), *rehearing denied* 110 U.S. 2196 (1990) ; 90-02 *cert. denied* 111 S.Ct. 129, *rehearing denied* 111 S.Ct. 544 (1990).

All of these petitions were made necessary by the deference of the Second Circuit to the discretion of Judge Nickerson in

[1]The modification was occasioned by the fact that the petitioner at oral argument before the Second Circuit panel in 1986 set forth the justiciability of his claim under 3rd party contract law as the alternative to an implied statutory right of action. He had earlier briefed the claim as third party beneficiary under the subsidy contracts in the Court of Appeals for the DC Circuit under the single creditor exception to 11 USC § 303 for a preponderant claim in *In Re American President Lines Inc. Debtor* 804 F.2d 1307.

following the mandated modification of the original draconic injunction. The Second Circuit has upheld Judge Nickerson's refusal to allow the Safir claims to be adjudicated.

The singular effect of Judge Nickerson's special relationship which formed the basis of his bias was not only to taint the injunction and the opinion upon which it was based, but to taint all the decrees in related cases and appeals in two circuits which used the decision in *Safir v. U.S. Lines, et al.*, 616 F. Supp. 13 (EDNY 1985) as the touchstone.

The result was to deny any remedy under either contract law or statute to the petitioner in spite of the fact that all actions taken since 1981 by the petitioner were to protect a valid judgment as to the liability of seven subsidized ship lines for breach of contract where petitioner was the third party beneficiary. That liability had been judicially affirmed by then Chief Judge William Bryant of the District Court for the District of Columbia in consolidated APA review actions *sub nom Safir v. Klutznick* 526 F.Supp 921 (1981). The District of Columbia federal court proceedings as of inception in 1974 are summarized by the Court in "*Klutznick*" p. 930.

The Court stated:

> In December 1974 the trade lines filed suit in this court to reverse the Secretary of Commerce's Order holding them liable for over a million dollars in subsidy recoveries. *See* Complaint for Review of Agency Action and for Declaratory Judgment and Injunctive Relief, Civil Action No. 74-1788 (December 6, 1974). the next month the non-trade lines filed a similar suit seeking the reversal of the secretary's finding that the non-trade lines technically violated § 810. *See* Complaint for Review of Agency Action and for Declaratory Judgement and Injunctive Relief,

> Civil Action No. 75-0077 (January 16, 1975). This court ordered the two AGAFBO complaints consolidated with Mr. Safir's suit in April 1978.[2]

Judge Bryant held that not only were the "trade-lines" liable for recoveries under their subsidy contracts but that the "non-trade" lines violated their contracts as well. *Safir v. Klutznick* makes clear that on the liability issue Safir was the prevailing party. The only reason that the "non-trade lines" had for bringing their APA review action to attempt exculpation was their fear that Safir might induce other courts to attach some consequence to "the otherwise innocuous determination of technical violation." *Safir v. Dole*, 718 F.2d 475, 484 (DC Cir. 1983). Judge (now Justice) Scalia held that since the "non-trades" were not injured by the Secretarial review on governmental recovery of subsidy contract funds they had no standing from the Secretaries determination.[3]

The Court further stated:

> We therefore need not (and indeed cannot) resolve in *this case* an issue that could be of great consequence elsewhere . . . . (Emphasis added)

"Elsewhere" was to be the Federal District Court in Brooklyn, N.Y. where the promise of a remedy under "common law principles under the subsidy contract" would "make it up to the victim" in the words of the late Judge Henry Friendly. *Safir v. Gibson* 417 F.2d 972, 977 (2d Cir. 1969).

The issue was to be a private right of action on judgment for unjust enrichment based on the ancillary jurisdiction of that district court as mandated by *Safir v. Gibson, supra*. However,

[2]The Federal Supplement, in error, lists the AGAFBO ship lines as intervening defendants on the title page.

[3]The Appeals of *Lykes, USL* and the other "trades" were dismissed on the merits.

instead of the remedy relied on by the petitioners as statutorily implied by Judge Friendly and instead of leave to refile the complaint under 3rd party contract law without prejudice, Judge Nickerson with extreme prejudice enjoined any further access to the Court.

The injunction issued without a hearing. In spite of its modification by the Second Circuit in 1986, the modification with the exception of the permitted filing of the third party claim in 1987, has resulted in no relief whatsoever. The Courts below have maintained an arcane unwillingness to allow the case to go forward — arcane that is, until January 1991, when the relationship of the judge and the chairman of his judicial selection committee Leonard Garment, Esq. came to the attention of the petitioner. Appended hereto is the "renewed" motion for leave to file for the Writ (p. 5a) and the Affidavit of Marshall P. Safir with eight exhibits in support thereof pages 7a through 85a.

The Affidavit is in effect the statement of the case. It documents the full court press on the petitioner since 1977 to make sure that Safir would not be in a position to induce other courts to attach some consequence to the otherwise "innocuous determinations" against the co-conspirators.

The first side effect of the District Court Memorandum and Order in *Safir v. USL et al, supra*, (1985) was to taint the final attempt to protect the judgment and thus his preponderant unjust enrichment claim not contingent as to liability under the single creditor exception in Bankruptcy of 11 U.S.C. § 303 in the D.C. Circuit in 1986, *cf In Re B.D. Int'l Discount Corp.*, 701 F.2d 1071 (1983), *cert. denied* 103 S.Ct. 3554 (1984). The decision in *In Re American President Lines* and *In Re Farrell Lines Debtors*,[4] 804 F.2d 1307 (D.C. Cir. 1986), used Judge

[4]Farrell took over *American Export Lines* in 1977 and assumed its liabilities.

Nickerson's decision as the linchpin and directly quoted from its language that the Safir Affidavit and this petition, *infra*, shows as biased and distorted in retrospect. The District Court injunction in *Safir v. U.S. Lines, supra*, also tainted *Safir v. U.S. Lines* (1986) in the same way in the Second Circuit to the effect of denying petitioner's ability to protect the judgement from 1986 to the present.

The Second Circuit Orders of August 12, 1987, and March 24, 1988, stem from *Safir v. Interstate Commerce Commission and CSX Corp.*, 831 F2d 283 (2d Cir. 1987), *cert. denied* 109 S.Ct. 111 (1988), rehearing denied 109 S.Ct. 520 (1988). Not one of these four appellate decisions, whose deprecatory dicta were taken whole from Judge Nickerson's language, mentioned the fact that the "harassing and vexatious" Mr. Safir was the party who had prevailed in *Safir v. Klutznick, supra*. Indeed, the seminal 25 pages of Judge William Bryant's findings of contract violation and conclusions of law are nowhere acknowledged at all.

All appellate decisions were based on the reliance of the two circuits on the impartiality of Judge Nickerson and, as a result, the ship lines were able to transfer many of their assets to other entities or to liquidate in bankruptcy while Judge Nickerson maintained the petitioner in humiliating civil restraint.

Moreover, the March 24, 1988 Order took no cognizance that the new maritime contract claims were filed in October 1987 with Judge Nickerson as authorized by *Safir v. U.S. Lines, et al.*, 792 F.2d at p. 25, ignored the fact that the Clerk of the Second Circuit refused to accept a Petition for Mandamus to the District Judge to compel the District Court suit to proceed, and instead harked back to its Order of August 12, 1987 which justified sanctions against the petitioner based on those parts of decisions from 1969 to 1986, which were no longer relevant to the action before Judge Nickerson in

1988. This history is recorded in greater detail in *In Re Marshall P. Safir* Petition for Writ of Mandamus, Supreme Court Docket 87-5789, *cert. denied.* 108 US 788 (1988).

Nevertheless, petitioner is grateful under the existing terms of the March 24, 1988 Order to the panel of the Second Circuit for its willingness to docket the instant motion for leave to file a Petition for Writ of Mandamus under Rule 21, Fed. R. of App. Proc., and to act on it. This action established the necessary jurisdictional link for the instant certiorari petition — the lack of such link may have been the infirmity which caused the denial of the Petition for Writ of Mandamus in Supreme Court Docket 87-5789.

Petitioner relies on his Affidavit of February 11, 1991, to show that by denial of this motion under Rule 21 Fed. R. of App. Proc., the Second Circuit has so sanctioned a "clear and indisputable" departure by a lower court as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

Political Sponsorship under 28 U.S.C. § 455(a)

The questions raised in this petition are unprecedented under 28 U.S.C. § 455(a) and § 455(b)(1) since their enactment in 1974, because they go directly to the political implications of judicial sponsorship when one such sponsor has, through the longevity of his tenure on a judicial selection committee, been able to exercise out-of-court control of a petitioner's access to due process in the circuit below.

The only case since *Liljeberg v. Health Services Acquisitions, Inc.*, 108 S.Ct. 2194 (1988), where the political sponsorship issue has been discussed is *Matter of Mason*, 916 F.2d 384 (7th Circuit 1990), but in that case, several of the underlying facts are inapposite to those that make up this petition, even

though the conclusions of Judge Easterbrook, speaking for the Court, appears to reject the spirit of *Liljeberg:*

> "Contributions raise less doubt than sponsorship . . . *In Re United States,* 666 F.2d 690 (1st Cir. 1981), sponsorship and other indicia of political support in bygone days do not disqualify a judge. A judge who seeks promotion may be tempted to defer unduly to the decisions or preferences of potential supporters; this potential does not require disqualification, and the risks created by political contributions in earlier years are smaller."
>
> *Matter of Mason,* p. 387.

Judge Easterbrook's dictum that the potential for a judge to be tempted to defer unduly to the preferences of potential supporters does not require disqualification, raises the issue of whether his opinion would be subject to change if, as in the case here, the judge has for years since his appointment sought promotion from the committee of which Mr. Garment was a member and was indeed appointed but not confirmed to the Second Circuit Court of Appeals once since becoming a district court judge. The support was not potential but active and existing. Moreover, unlike *Mason*, a suit that does not seek to create personal liability (*Mason supra* p. 385) the issue of liability, already decided in petitioner's case was constantly to be placed in double jeopardy.

Another of the cases cited by the Court was *Home Placement Service Inc. v. Providence Journal Co.,* 739 F.2d 671, 576 (1st Cir. 1984) in which the Court held the link between the senator and the defendant through a cousin as tenuous, the judge was nevertheless disqualified. In the case of the petitioner, the link between the defendants and Mr. Nixon through Senator Moynihan and Mr. Garment was far from tenuous in a matter which involves a private citizen in pursuit of a per-

sonal recovery of unjust enrichment which calls into question the malfeasance of the benefactor most responsible for the construction of their own national reputations. The fact that Mr. Nixon was not named a defendant in petitioner's litigation is irrelevant.

> "To impute a lack of privity is to exalt the form of the transaction over its substance, and to ignore the reasonableness standard of § 455(a), which requires us to judge the situation from the viewpoint of the reasonable person and not from a purely legalistic perspective."
>
> *In Re Drexel Burnham Lambert, Inc.*
> 861 F.2d 1307, 1319 (2d Cir. 1988)

The Seventh Circuit because of the early stage of "Mason" and the lack of precedent, reserved its power to step in if evidence of actual bias came to light.

Actual Bias Under 28 U.S.C. § 455(b)(1)

The evidence of actual bias in *In Re Marshall P. Safir* is set forth in the Safir Affidavit of February 11, 1991, and should have come to light in the judicial proceedings in *Safir v. U.S. Lines, supra, sua sponte.* It only becomes apparent now when Safir v. U.S. Lines, 616 F. Supp. 613 (1985) is examined in the context of the special relationship between Mr. Garment and the judge. See Safir Affidavit paras. 13, 15 , 17, 18, 19, 20 (p. 11a to p. 14a).

Significant proof of that bias arose out of the deposition of the petitioner of September 28, 1977, and the incorporation of relevant parts of it in Annex A to an unreported memorandum and order of Judge John F. Dooling of December 20, 1977 (Annex A is appended, p. 25a to p. 34a). Acceptance of this uncontroverted testimony as true and already in the hands of

the government was prerequisite for the District Court to dismiss the action under 31 U.S.C. § 232 in *U.S. ex rel Marshall P. Safir v. U.S. Lines, et al,* EDNY 1977. This decision was affirmed *sub nom. Safir v. Blackwell,* 579 F.2d 742, 746 ft. note 5, *cert. denied* 441 U.S. 943 (1979)[5].

District Judge Nickerson evidenced his bias by holding that conspiracy evidence was "theory," displayed further bias by stating that *Safir v. Klutznick, supra* was vacated (*Safir v. USL 1985 supra* p. 617, 618), when *U.S. Lines v. Klutznick* and *APL v. Kllutznick sub nom Safir v. Klutznick* were the operative judgments in Safir's favor and not a continuation to "assert many of his claims after rejection." *U.S. Lines supra* p. 618. It was a judgment as to liability of the defendants and thereafter its distortion skewed the judge's reasoning as set forth in the Affidavit. Judge Nickerson's use of the word "theory" does not exempt disqualification on grounds that a legal issue was involved. The judge showed his bias by attempting to dispute a fact found by his predecessor of such significance as to require dismissal under 31 USC § 232 in *US ex rel Marshall P. Safir v. USL et al, supra.* This alone is grounds for disqualification under § 455(b)(1). While Section 455(a) does not require acceptance by the Court that all allegations by the moving party are true, *United States v. Greenough,* 782 F2d 1556, 1558 (11th Cir. 1986), in this case Judge Dooling's acceptance of it in his Order of December 20, 1977 should have been sufficient to work an estoppel on Judge Nickerson's "theory."

Only after the knowledge of the special relationship surfaced has the petitioner had justification to "walk back to the cat."

[5]The Petition for Rehearing Docket 83-1627 (App. pp. 36a to 49a) in *Safir v. Dole* addresses the damage to the electoral process in 1980 by government inaction. The issue of further damage in 1980 is once again under review in 1991 based on new charges regarding manipulation of the release of American Embassy hostages in Iran. Mootness revisited.

No reasonable person, and certainly not a reasonable person acting *pro se* in 1985, would question the impartiality of a respected judge under the intimidating threat of sanctions *cf. In Re Martin-Trigona*, 731 F.2d 1254 (2d Cir. 1984), in addition to the injunction approved on appeal without any hearing required. The D.C. Circuit in *In Re American President Lines, Inc., supra* p. 1310, while adopting Judge Nickerson's pejoratives nevertheless appeared to disapprove of the fact that the petitioner was not afforded a hearing.

Conflict Between Circuits

There is a conflict between the Circuits as to whether § 455(a) is an independent basis for mandatory disqualification which require no determination of bias in fact or whether § 455(a) equates with § 455(b)(1). *U.S. v. Chantal* 902 F.2d 1018, 1022, 1023 (1st Cir. 1990). Petitioner nevertheless believes he has made the case both ways. The extra-judicial source rule is met by the Safir Affidavit paragraphs three (3) through twelve (12) plus paragraphs 14 and 15 and the judge's four-year dogged refusal to allow the case to proceed in civil contract and in admiralty when the defendants are collaterally estopped from raising the issue of liability and without explanation — goes beyond appearance of partiality to bias in fact. Even if the information was obtained by the judge in the performance of his official duties the charge of lack of impartiality is grounded on facts which would create reasonable doubt in the mind of a reasonable man. *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976) *cert. denied*, 430 US 909 (1977).

The fundamental reason why the judge could not explain why he could not make a decision on stated grounds as to the merit of the new claims under third party beneficiary contract law or why he would refuse to permit amendment of the complaint with a maritime lien claim was that his original decision in *Safir*

v. USL supra, p-617 ruled out any private right of action under common law principles.

His bias against the petitioner was clearly stated:

> "To permit plaintiff, who has been out of the shipping business for over 15 years, and allegedly has no intention of returning to it, to collect in excess of $3 billion (including interest and profits) from eight American flag carriers actively engaged in international shipping would hardly foster the merchant marine."

This is prejudice on its face. So long as the judge had the option under implied statutory right of action theory he could withhold a monetary remedy from the plaintiff. However under a contract law claim he could not. The Court was saying this claim cannot be allowed because the power to recover subsidies is expressly granted only to (government) officials — even if *Safir v. Gibson supra* found such to be subject to recovery only under contract law. His bias against the new claim was recorded at the threshhold and it was not based on common law but on what he conceived to be a statutory policy which protected eight predators who had in some manner returned to "the paths of virtue."

The bias is further clarified when the judge stated:

> "Private litigants need not consider the public interest. They may be expected to pursue their own advantage and to be at best, indifferent to whether recovery of past subsidies would hinder the growth of the merchant marine."

This is an admission that contract law is properly a matter between parties right or wrong and where the Court cannot take sides under the guise of statutory discretion. In the light

of the new claims filed in 1987 everything quoted above is prejudicial within the meaning of both §455(a) and § 455(b)(1). When the new claims were filed the judge had the fundamental duty to recuse himself. *Roberts v. Bailar* 625 F.2d 125, 127-129 (6th Cir. 1980).

What is equally meaningful is that the policy of the Act to foster the development of the American Merchant Marine which Judge Nickerson felt necessary to defend was by 1985 already a disaster and by no means the merchant marine panacea of the 1960's which Judge Friendly described in 1969. The merchant marine of the 1990's is in the process of being restructured essentially along lines set out by this petitioner in 1965-1966 "who has been out of the shipping business for over fifteen years" (now twenty years) and who, contrary to the opinion of the judge has every intention of returning to it with the proceeds of the contract claims.

Pending the outcome of this petition the new shipping policy of the United States is on hold while the administration's naval and maritime policy team "look sheepishly at each other and smile." See The Journal of Commerce page 10B, April 24, 1991 (p. 93a).

Vacatur of Judgments

This Court has held that violation of 28 U.S.C. § 455(a) which requires a judge to disqualify himself in any proceeding in which his impartiality may reasonably be questioned may warrant relief from final judgment. [*Liljeberg v. Health Service Acquisition Corp., supra.*]

To the extent the Safir Affidavit makes the factual basis for such vacatur, collateral attack under Rule 60(b)(6) grounded on the statute alone falls short of the solution needed in this case where injunctions exist on two separate judicial levels.

The appellate injunction in the Second Circuit and its instant panel's denial of relief under Rule 21 F.R. App. Proc. is error of constitutional dimensions in the deprivation of petitioner's rights.

It has generally been held that § 455 and the Due Process Clause are not coterminous. *U.S. v. Couch,* 896 F.2d 78, 81 (5th Cir. 1990) This petitioner argues that in the unique fact situation of the two injunctions against access to the district and appellate courts, they are coterminous — the former under § 455 and the latter under the Fourteenth Amendment. The appearance of impropriety here arises to the level of the "fundamental defect" resulting in a complete miscarriage of justice. The petitioner makes no claim that any Second Circuit court judge holds a bias against him, the continued presence of Mr. Garment on the Second Circuit selection committee notwithstanding. One must subscribe however to the "reasonable formulation" in *Aetna Life Insurance Co. v. Lavoie,* 106 S.Ct. 1580, 1585 (1986), whether the "situation is one which would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true." *Ward v. Village of Monroeville,* 93 S.Ct. 80, 83 (1972).

It is reasonable to assume that the temptation to sustain the injunctions in status quo is stronger than ever to protect the reputation of a respected judge and that of his sponsor, whose reported close personal relationships with members of the bench in New York and Washington, D.C. owe a considerable debt to Richard Nixon. Moreover, "judges sitting in review of others do not like to cast aspersions." *Matter of Mason,* 916 F.2d 385, 386 (7th Cir. 1990).

The legal task of this petitioner is daunting. Already stigmatized by the existing injunctions, petitioner is confronted by the carefully contrived resurrection of a former President, no less, whose only remaining known (but yet unpublicized)

blot had all but been covered up. Petitioner takes comfort in the fact that judges, faced with the task of passing on the integrity of a fellow member of the bench under both § 455(a) and § 455(b)(1) in the face of an uncontroverted sworn testimony by a party in interest, know that the maintenance of the status quo is "unlikely to quell the concerns of the skeptic." *Liljeberg v. Health Services Acquisitions, supra* p. 2205 ft.note 12.

These judges are also unlikely to favor reconsideration of the irreparable harm that reliance on that integrity has wrought since August 12, 1987. The denial of standing to question the purchase of U.S. Lines vessels by CSX Corporation, the denial of standing to question the approval by the I.C.C. of the purchase of Sea Land Service by CSX Corp under 49 U.S.C. § 11321(b), both stand tainted under the Due Process Clause of the Fourteenth Amendment by the continued reliance on the judge now under § 455 attack who refused to allow the new civil contract claims filed in 1987 to be adjudicated under the 1986 modification in *Safir v. U.S. Lines, et al.*, at p. 25. Nevertheless, while the blot on Nixon and the maritime lien on the former U.S. Lines vessels and the others vessels remain indelible, so does the stigma of the injunctions against the petitioner in pursuit of his claims in jurisidictions other than the Second Circuit, branded with the likes of vicious antisemites [*In Re Martin-Trigona*, 731 F.2d 1254 (1984)] and common criminals [*cf. Abdullah v. Gatto*, 773 F.2d 487 (1985)] for litigious excesses in the indelible type of the Federal Supplement and the National Reporter.

In the *Liljeberg* case, the Court held that for a decision to require vacatur under Rule 60(b)(6) once there is a findng that a judge's impartiality may reasonably be questioned, there were three considerations to be met.

First, whether the motion is made in a reasonable time. In

this case, the Second Circuit set no time limit on the filing of new claims by the petitioner in *Safir v. U.S. Lines, et al.*, 792 F.2d 19, 25 (1986), nor has that Court yet reviewed on appeal the rejection by the district court of the Safir third-party beneficiary claims under the goverment contract with the defendants in EDNY Docket 85-0864, which claims were filed by Safir within the six year statute in New York for actions on contract liability. Moreover, there is no statute of limitations on maritime lien claims. Direct review is still available and petitioner had disclosed his facts promptly on learning them. *See Hardy v. United States*, 878 F.2d 94, 97 (2d Cir. 1989).

The second consideration is the risk of injustice to the particular parties. In this case, the injustice of the injunction, prejudicially conceived, falls only on the party under restraint. Surely as the modification of the original judgment by the Second Circuit reduced defendants reliance on it, the stigma nevertheless will remain to color judicial acceptance of maritime lien claims against vessels of the defendants found in other jurisdictions in the near future. The stigma and the risk of injustice that it brings to these other actions is the third consideration for the court suggested by "*Liljeberg*" and it speaks for itself. The fourth consideration is the risk of undermining public confidence in the judicial process. On this point, petitioner stands mute.

CONCLUSION

As this petition is being written, the *New York Times* of Thursday, April 25, 1991, page B9 is on the writer's table. At oral argument in *Payne v. Tennessee*, No. 90-5721, Justice David Souter asks if society values the lives of different victims differently "isn't the real problem one of almost of equality before the law?" The defense attorney agreed.

Judge Souter returned to the issue later when he interrupted Mr. Burson, the Tennessee Attorney General. "You are saying it really is legitimate to value victims differently based on an evaluation of the lives they've chosen to lead?" Justice Souter asked.

"We can look at the President and we can look at a homeless person,"[6] Mr. Burson replied. He said that while the "sanctity of their lives" was equal, the state should be able to take into account the judgment that "the murder of the President creates a much greater societal harm."

Justice Stevens said, "That seems to imply that some human beings are unique and others are not."

Petitioner prays the writ be granted.

Respectfully submitted,

MARSHALL P. SAFIR
271 Grand Central Parkway
Floral Park, New York 11005
(718) 225-0210

May 10, 1991

---

[6]It is a matter of record that the petitions in *In Re Marshall P. Safir* in Dockets 87-5789 and 87-7222 were filed *in forma pauperis*.

United State Court of Appeals
FOR THE SECOND CIRCUIT

ORIGINAL	:	91-8010
	:	*Docket Number*
IN RE MARSHALL P. SAFIR	:	NOTICE OF MOTION
	:	state type of motion
	:	for Leave to file Petition for
Use short title	:	Writ of Mandamus

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
FEBRUARY 12, 1991
ELAINE B. GOLDSMITH, CLERK

MOTION BY: *(Name address and tel. no. of attorney in charge of case)*

MARSHALL P. SAFIR, pro se
271 Grand Central Parkway
Floral Park, NY 1105
(718) 225-0120

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and of attorney in charge of case)

Haight Gardner Poor & Havens
Shea & Gardner Foley Hoag & Eliot
Kominers Fort Schlefer & Boyer
Stroock, Stroock & Lavan
Walter Constan & Schirtman

JUDGE EUGENE NICKERSON

Brief statement of the relief requested:

Vacatur of Judgment and Recusal

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED 2/11/91
FEB 28 1991
ELAINE B. GOLDSMITH, CLERK

/s/James L. Oakes
/s/J. Edward Lumbard
/s/Richard J. Cardamone

Previous requests for similar relief and disposition:

On October 15, 1987 and in Janaury 1989 for Mandamus to compel issuance of summons to allow case to proceed.

Statement of the issue(s) presented by this motion:

Whether, based on newly discovered evidence, Judge Nickerson should have recused hmself from this case because his impartiality could have reasonably been questioned.

Brief statement of the facts (with page references to the moving papers):

Judge Nickerson was selected for the Federal Judiciary in 1977 by a committee headed by a former law partner and general counsel to President Nixon, Leonard Garment, at a time when Applicant Safir revealed in sworn testimony evidence of a corrupt scheme involving the ex-president. Judge Nickerson was 'appointed' to succeed the Judge who was presiding over the multi-faceted Safir litigation.

Summary of the argument (with page reference to the moving papers)'

The District Court Judge should have recused himself because if the facts of the Garment special relationship were known at the time of his succession to the litigation any reasonable person would have solid grounds to question the judge's impartiality under the circumstances. By not recusing himself he was in violation of 28 UCS § 455(a) and § 455(b)(1).

Docket No. 89-8008

United States Court of Appeals
FOR THE SECOND CIRCUIT

IN RE MARSHALL P. SAFIR

NOTICE OF MOTION

MARSHALL P. SAFIR, pro se

Attorneys for Petitioner
Office & Post Office Address & Telephone Number

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(718) 225-0210

*RULES OF THE UNITED STATES COURT OF APPEALS
for the SECOND CIRCUIT
supplementing
Federal Rules of Appellate Procedure

Sec. 27. Motions;

(a) Form of Notice of Motion and Supporting Papers for Motions and Opposition Statements

(1) Notice of Motion: The moving party shall submit the Notice of Motion in the format approved by the court with such changes as the Chief Judge may from time to time direct.

(2) Supporting Papers for Motions and Opposition Statements:

(a) Affidavits should contain factual information only. Affidavits containing legal argument will be treated as memoranda of law.

(b) Memoranda of law shall not exceed ten typewritten double-spaced 8½'' x 11'' pages except by permission of the court.

(c) Copy of the lower court or agency order, judgment or decision shall be included as a separately identified exhibit by a moving party seeking substantive relief.

(d) Exhibits attached should be only those necessary for the determination of the motion.

(3) Non-compliance Sanctions: If the moving party has not complied with this rule, the motion may be dismissed by the clerk without prejudice to renew upon proper papers. If application is promptly made, the action of the clerk may be reviewed by a single judge. If the responding party fails to comply with this rule, the court may refuse to hear that party at oral argument. The court may impose costs and an appropriate fine against either party for failure to comply with this rule.

* * * * *

Federal Rules of Appellate Procedure

Rule 27(d) Form of papers; number of copies. All papers relating to motions may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

89-8008 (Redocketed as 91-8010)

IN RE MARSHALL P. SAFIR,

Nickerson, J. EDNY
85 Civ 0864

RENEWED MOTION FOR LEAVE
TO FILE PETITION FOR WRIT OF MANDAMUS
TO A DISTRICT COURT JUDGE

Marshall P. Safir, as required by this Court's Order of March 24, 1988, respectfully moves this court for leave to file anew a Petition for Writ of Mandamus to Federal Judge Eugene Nickerson of the District Court for the Eastern District of New York to vacate under Rule 60(b)6 FRCP the permanent injunction against the applicant which denied his unfettered right to due process and equal protection of the laws in Docket 85-0864 of the District Court on the grounds that the District Court Judge in taking that action in 1985 and subsequent action in 1989 to thwart the mandate of this Court in *Safir v. US Lines, et al*, 792 F.2d 19, 25 (1986), did prevent the controversy from being adjudicated in personam and in rem by violation of the Judge's duty under 28 USC § 455(a) and 455(b)(1).

The applicant Safir by affidavit attached hereto sets forth the reasons why the judge should have disqualified himself in light of the associations arising from the judge's appointment to the bench and why the District Court decision in *Safir v.*

US Lines et al 616 F.Supp. 613, 618 (EDNY, 1985) by its critical disdain of uncontroverted testimony by the applicant-plaintiff relating to those associations did manifest a prejudice and bias against the plaintiff (and an embarrassment to this Court over the years when the applicant was not aware of the judge's association) as to warrant further review under 28 USC § 372(c)(1).

Wherefore, applicant prays that his motion be granted, that this motion with the accompanying affidavit, exhibits and memorandum of law be accepted as the petition in accordance with Rule 21, Fd R. of App. Proc.; that this Court direct Judge Nickerson to vacate the injunction, order process to be served on the defendants in Docket 85-0864 and thereafter recuse himself from the case.

Dated: February 11, 1991

MARSHALL P. SAFIR
271 Grand Central Parkway
Floral Park, NY 11005
(718) 225-0210

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

89-8008 (Redocketed as 91-8010)

IN RE MARSHALL P. SAFIR,

Nickerson, J. EDNY
85 Civ 0864

AFFIDAVIT IN SUPPORT OF RENEWED MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS TO A DISTRICT COURT JUDGE

MARSHALL P. SAFIR, being duly sworn, deposes and says:

1. On February 21, 1989, this Court denied a motion by the undersigned for leave to file a Petition for Writ of Mandamus in Docket 89-8008.

This affidavit is filed in support of the renewed motion for leave to file a writ of mandamus to Federal District Judge Eugne Nickerson for the purpose of compelling the judge to rescind the permanent injunction against the affiant and recuse himself from the proceeding on grounds that the judge violated the objective qualification standard mandating disqualification when a reasonable person would question a judge's impartiality.

3. This action is warranted based on information told to the Affiant in December 1990 culminating in an archival microfilm search of the New York Times of September 11, 1977 in January 1991. A copy of the relevant page in the Long Island section is Attachment 1 hereto. The Times article states that

Judge Nickerson was recommended by two former high officials in the Nixon Administration; Senator Patrick Moynihan and the head of a selection committee appointed by him — Leonard Garment.

4. In 1977, Leonard Garment, who had been general counsel to President Nixon during the Watergate period had returned to New York and was reaffiliated with the Nixon, Mudge law firm whose name after Watergate had reverted back to Mudge Rose Guthrie and Alexander. See excerpted Martindale Hubbell Law Directory 109th Ediction [1977]. (Att. 2 hereto.)

5. The association of these former Nixon administration officials to the Nickerson appointment, Senator Moynihan had been an Assistant to the President and Mr. Garment had been General Counsel to the President, is significant to the renewal of this motion as it forms the missing link to an understanding of the arcane, illogical, disdainful and unfair treatment of this applicant-petitioner by Judge Nickerson since the maritime subsidy recovery litigation against the defendant contractors returned to the Eastern District in 1985. This conduct has irreparably harmed affiant's efforts to achieve a private restitutionary remedy for the valid judgment as to liability against the defendants after prevailing in *Safir v. Klutznick*, 526 F.Supp. 921 (DDC, 1981).

6. Judge Nickerson was recommended in 1977 to fill the vacancy resulting from the decision of Judge John F. Dooling to assume senior status on the Court. Judge Dooling had presided over the Safir litigation since its federal court commencement in 1968. The New York Times reported this impending succession on August 18, 1977. (Att. 3, hereto.)

7. On or about the time of the Nickerson selection in August 1977, affiant was subpoenaed by the defendant contractors

to a deposition in *United States ex rel Marshall P. Safir v. US Lines et al* in Docket 77 Civ. 1093 (EDNY, Dooling, J.) a false claim action arising out of the events of the original AGAFBO conspiracy in 1965-1966. This Court in *Safir v. Gibson*, 417 F.2d 972 (1969) had mandated an investigation which resulted in the finding of violation of 46 USC § 1227 by the Secretary of Commerce immediately after the Nixon resignation but five years after this Court's mandate of 1969. The Secretary made the finding that the section had been violated but mitigated recovery for the government by a further finding of complicity by government officials in the 1965-1966 conspiracy.

8. The deposition was held on September 28, 1977 in which, in response to questioning by counsel, affiant testified that the contractors had in 1968 entered into a second conspiracy — a corrupt scheme between the contractors and Richard Nixon in the summer of 1968 after nomination and *before his election* to defeat Safir in subsidy recovery litigation where liability of the contractors exceeded $200,000,000.00 The affiant had been informed of this scheme by a Pulitzer Prize winning newspaper reporter whose own knowledge of it had been gleaned from leaks from the Watergate hearings in 1973-74. The scheme involved the payment of a sum between $5,500,000 and $7,000,000 depending upon the outcome of the settlement of the Sapphire Steamship Lines anti-trust case against the contractors then in the control of a bankruptcy trustee. That case was settled in 1973 for $1,600,000. The scheme, in addition to defeating the subsidy recovery litigation required that Mr. Nixon select Spiro Agnew as his vice-presidential running mate. The defendants' contact with Mr. Nixon was one Spyros Skouras a greek-american whose ship line was one of the defendants in this litigation (Prudential-Grace Lines, Inc.,).

9. The source of the information of this conspiracy indicated

that high officials of relevant executive branch agencies, Dept. of Justice, Commerce and the Office of the President (and Vice-President) were enlisted to accomplish the objective by any and all means. The five year delay in the Department of Commerce and the mitigation of governmental recovery to a pittance was ample proof that Nixon and high officials in his administration lived up to his bargain as long as he was able to remain in office. It was also clear that evidence of the corrupt scheme of the summer of 1968 was a matter not covered by the Nixon pardon and thus a continuing threat to Nixon's rehabilitation. Leonard Garment as Nixon's former general counsel as President and law partner was, and is, loyal to him having benefited so greatly from that association. The rehabilitation of Nixon's reputation has been a crusade. The spiking of information of this sordid affair has been essential to that end. Relevant Nixon tapes and WSPF documents have not been made public to this day. In addition, to the legal means used by lawyers for the ex-president there has also been a persistent campaign to discredit and denigrate and pauperize the intended victim of the scheme to make his dissemination of the fact harmless.

10. Nevertheless, Judge Dooling memoralized relevant portions of the Safir deposition when he dismissed the False Claims Act in Docket 77 Cir. 1093 in his unreported decision of December 20, 1977 by appending them as Annex A. Annex A is Attachment 4 hereto. Judge Dooling held that the evidence was not germane to the FCA action because, coming from the Watergate hearings, it represented information already in the hands of the government and thus the Court was without jurisdiction under 31 USC § 232.

11. The sequence of events in 1977 surrounding the selection of Judge Nickerson and the Safir deposition in September of that year should now be viewed in light of the affiant's 1991

microfilm revelation. Affiant recalls and the transcript of the deposition bears out (see ATT. 5 Safir Transcript, page 45) that he had discussed the facts that would later be the subject of the deposition, with his brother William Safire in the early spring of 1977. Brother William was also a Special Assistant to the President in the Nixon administration and had developed a close friendship with Mr. Garment which continues to this day. As a result of this conversation, which was not intended in any way to be confidential, it is reasonable to assume that Leonard Garment was aware of the content of that conversation immediately thereafter — before Judge Nickerson was selected by the Garment committee.

12. It is reasonable to assume that Judge Nickerson as Judge Dooling's successor to-be was aware of Annex A after his confirmation as it would pertain to his own jurisdiction of the litigation when it returned to the Eastern District under the mandates of *Safir v. Gibson, supra* (1969) and 432 F.2d 137 (1970) after a protracted Administrative Procurement Act review of the Secretarial decision was completed in the D.C. Circuit. *Safir v. Dole, 718 F.2d 475 cert. denied* 467 US 1206 (1984) rehearing denied 467 US 1268 (1984).

13. It is thus not unreasonable to asssume that he had personal knowledge of the content of the Safir deposition after September 28, 1977 and before his confirmation in late October of 1977. Personal knowledge of disputed evidentiary facts concerning the proceeding is a violation of § 455(b)(1). The evidentiary facts of the Safir deposition of September 28, 1977 while they were uncontroverted and accepted as true by Judge Dooling were certainly disputed as "theory" by Judge Nickerson gratuitously eight years later when he finally succeeded to the litigation. (*Safir v. US Lines et al,* 616 F.Supp. at p. 618.)

14. It is reasonable to assume that the appearance of impropriety, in succeeding to litigation so closely involved with

the continuing efforts of Mr. Garment to protect the remaining reputation of his former leader was not lost on the freshly confirmed judge. Nevertheless, affiant is informed by the Supreme Court decision in *Liljeberg v Health Acquisition Services, Inc.*, 108 S.Ct. 2194 (1988), that violation of § 455(a) requires neither scienter nor consciousness of the circumstances.

15. Prior to the return of the litigation to the Eastern District of this Circuit, the appeals of the protracted Administrative Procedure Act review of the findings that the defendant ship lines had violated section 810 of the Merchant Marine Act of 1936 were concluded. This affiant in the Petition for Rehearing in *Safir v. Dole et al.*, Supreme Court Docket 83-1627 prophetically stated his need for certain Nixon tapes and WSPF documents under the policy of Rule 301 of the Federal Rules of Evidence without then knowing the danger inherent in returning the litigation to Brooklyn for his remedy based on the "Klutznick" judgment.

> "The plaintiff may not be asking the Court to disturb the status quo, but rather to protect him from someone who has the power to affect the out of court situation without aid of the Court. This extra-judicial impact is well recognized." (*Wright and Graham on Evidence*, Sec. 5422.)

Those with the power to affect the out-of-court situation were given a free hand to savage the plaintiff at will. Leonard Garment acting on behalf of his former law partner had that power handed to him even before Judge Nickerson was appointed to succeed Judge Dooling. See Attachment 6, Petition for Rehearing S.Ct. Docket 83-1627 cert. denied 467 US 1268 (1984) at page 7, ft. n. 3.

16. When as the prevailing plaintiff in the APA action in the

D.C. Circuit, affiant returned to the Eastern District for ancillary relief as promised in *Safir v. Gibson, supra* at pp. 997, 978, or for a private right of action for restitution, Judge Nickerson instead enjoined him from further access to the Court. The decision in *Safir v. US Lines et al., supra* in the district court when examined in the context of the special relationship between Mr. Garment and the judge reveal that findings used as foundation to justify the banishment of the plaintiff were distorted.

17. There was disingenuity in characterizing the application for dismissal of an appeal as "eccentric" (*Safir v US Lines et al., supra* p. 618). The appeal plaintiff moved to dismiss was a government appeal in 1982 against the findings in favor of Safir by Judge William Bryant in *Safir v. Klutznick* that the "non-trade" line violation of Section 810 was not technical as claimed by the Secretary of Commerce in 1974 but as wilfull as the "trade lines". The motion to dismiss was based on the "clean hands" doctrine because discovery permitted by Judge Bryant revealed in documents from the files of the Department of Justice that in the carrying out of the corrupt scheme hatched in 1968, the Department of Justice was undermining its own prosecution of the violation mandated by this Court in *Safir v. Gibson*, 417 F2d 972, 977, 978 (1969). The government withdrew its appeal rather than risk dismissal.

18. There was disingenuity in the judge's emphasis on all of the unfavorable decisions the plaintiff has suffered in the past while omitting the fact that the reason for the litigation before him was that Safir had prevailed against both the government and the defendant contractors in a valid judgment as to liability in *Safir v. Klutznick, supra*. the judge then put misplaced emphasis on a holding in *Safir v. Dole*, 718 F2d 475, 484 regarding further standing (no longer necessary under the completed APA review) and dicta about plaintiff's chances in

the future on a statutory remedy, above a valid finding of fact in the District Court that there was a breach of contract law.

19. In order to further justify the denial of due process and equal representation to the prevailing plaintiff and in an obvious display of personal prejudice, the judge scornfully alluded to a rueful, self-deprecatory comment made by the plaintiff in a deposition in a related case where another former Nixon official was the adversary attorney of record (Rita Hauser, Esq.). The comment was made during that period when the plaintiff had been reduced to unemployed pauperial status in this struggle. The judge interpreted as a *boast* the comment that his sole occupation is being "the world's foremost litigator" and, therefore, grounds for injunctive restraint. *(Safir v US Lines et al.,* at p. 619.)

20. Lastly as to the 1985 decision in retrospect Judge Nickerson's insensitivity to a judge's duty under 28 USC § 455(a) was further manifest by his disapproval of affiant's earlier move to have Judge MacKinnon recuse himself when a book by John Erlichmann revealed that the Circuit judge played cards on a weekly basis with Nixon while he was President. He saw no basis where that judge's impartiality could have been questioned in a case where Annex A was uncontroverted on the public record and the reputation of Judge MacKinnon's friend could be further sullied if the appellant be allowed to prevail in Judge MacKinnon's Court.

21. Furthermore, the actions of Judge Nickerson since his decision in 1985 became less arcane when seen in the light that those actions were influenced by out-of-court bias. This Court in *Safir v. US Lines et al.,* 792 F2d 19, 25 (1986) cert. den. 107 S.Ct. 1323 (1987) modified the injunction so as not to foreclose new claims arising out of the events that were found to have been a contract violation by the defendants. The District Court blatantly ignored that mandate in rejecting a mo-

tion in 1987 for leave to file such new claim not only without a hearing but without any explanation or reason why the proposed complaint was not meritorious. It was only after a Petition for Mandamus was filed in this Court on October 21, 1987 (see Supreme Court Petition for Rehearing *Safir v. Prudential Insurance Co. et al.*, 90-02, Att. 7, at Appendix pp. 9a-11a) that the new complaint was docketed in the Eastern District and dated (as of October 15, 1987) within the six-year limitation for contract claims to impose a constructive trust based on the *Klutznick* judgment.

22. Two years later on January 9, 1989 the plaintiff-affiant found it necessary to request this Court for leave to file another mandamus petition in Docket 89-8008. See Att. 7 Supreme Court Petition 90-02, Motion and Safir affidavit January 9, 1989 at appendix pp. 12a-19a. This petition set forth the harm to the Safir claim that the injunction and the district court refusal to allow summons to be served on the 1987 claim had wrought on the ability to protect it in bankruptcy and admiralty proceedings of a major defendant, United States Lines Inc. Debtor in Chapter XI.

23. The Petition for Rehearing in the Supreme Court in *Safir v. Prudential et al in rem* Docket 90-02 (Att. 7 thereto) was filed to show the efforts made by the affiant to defend his claim against the finding of laches in the Southern District as a result of the constraints imposed by Judge Nickerson in preventing the case before him to go forward on the merits.

24. Judge Nickerson on May 12, 1989 (Att. 8) refused to make any decision on stated grounds why the complaint was without merit *in personam* under third-party beneficiary contract law or why he would refuse to permit amendment of the complaint with a maritime lien claim in admiralty when both were supported by prevailing law and precedent. Both orders merely stated "He has failed to show why his current claims

are different from the earlier action or why they have any merit." Affiant submits that the judge could not do so on stated grounds without manifesting a clearly erroneous and indefensible abuse of discretion and thus elected to cover his bias with silence.

25. For the reasons stated above affiant prays that this Court will grant this renewed motion for leave to file a writ of mandamus for the purposes outlined in the motion. The link of association between Leonard Garment and the District Court judge and the conduct of this litigation since 1985 establishes ample grounds under 28 USC § 455(a) for recusal and vacatur of all existing restraints.

26. Where the affiant as a party to the action needed the Court to protect him from someone who had the power to effect an out-of-court situation, the district judge paid his dues to that power to prevent the *pro se* plaintiff from vindicating his rights. The judge was in violation of 28 USC § 455(b)(1) in the circumstances of this case based on that special relationship with Mr. Garment. The affiant's struggle for the past five years through a Kafkaesque legal web spun more than 13 years ago is no longer arcane. The veil has been lifted.

/s/Marshall P. Safir

Sworn to before me this
11th day of February, 1991.
/s/Margarete A. Vecchiarelli
Notary Public, State of New York
No. 30-4522255
Qualified in Nassau County
Commission Expires April 30, 1992

THE NEW YORK TIMES, SUNDAY, SEPTEMBER 11, 1977

LONG ISLAND
OPINION

Nassau's Own Adlai Stevenson

By FRANK LYNN

WHILE THE VOTERS of Nassau County are in the process of deciding who will be the next County Executive, the last County Executive, Eugene H. Nickerson, is about to become a Federal District Court judge in what most politicians concede is a fitting climax to a checkered political career and an all-too-frequent mismatching of the man and the job.

Senator Daniel P. Moynihan's recommendation of the 58-year-old Mr. Nickerson—which is tantamount to appointment, subject only to what should be a routine confirmation by the Senate—was widely greeted as a "natural" for the former County Executive, an intelligent, scholarly, judicious politician who many believed would have made a very capable Governor or Senator if only he could have been elected.

He came into politics 25 years ago as

was defeated in his attempt to be a Stewart Udall delegate to the Democratic National Convention.

He did support Mr. Moynihan in the Senate primary last year, but he was not a major figure in the Moynihan camp.

How did Mr. Nickerson get the recommendation for a Federal judgeship? To begin with, he in effect applied for the $54,500-a-year lifetime job through a 10-member screening committee set up by Mr. Moynihan. The committee is headed by Leonard Garment, the Manhattan lawyer who was a former law partner of Richard M. Nixon and adviser to the for-

POLITICS

mer President. Mr. Garment was a top adviser in Senator Moynihan's campaign last year.

Mr. Nickerson was one of 20 lawyers to apply for the Federal judgeship, and

similarity between the two men is striking.

Mr. Nickerson had initially won the County Executive post in an upset victory in which he capitalized on Republican scandals and a weak Republican candidate, Robert W. Dill. Re-election for two terms was less difficult for Mr. Nickerson with the advantages of incumbency, a newly vitalized Democratic Party headed by John F. English and an administration that apparently satisfied the electorate.

Yet, Mr. Nickerson could never translate his Nassau triumphs into a statewide victory. Part of the problem was that he was running in the era of the Vietnam War and domestic unrest, when the fragmented statewide Democratic Party was a confederation of ideological and geographical fiefdoms rather than an organized party.

Another problem was Mr. Nickerson himself. He was well liked by those who knew him personally, but this warmth did not come across on television or in mass meetings, the normal arena for statewide politicians. Instead, Mr. Nickerson appeared patrician and stiff.

"It became somewhat of a cliche for politicians to say that Mr. Nickerson would probably make an excellent Governor or an excellent Senator and then add: "But can he be elected?"

He left the County Executive post at the end of 1971, and it has been downhill politically for him ever since—until recently.

In the years since 1971, Mr. Nickerson had seemed a lost and forlorn soul at party gatherings or at endorsement sessions for various other candidates as he attempted to keep alive politically. As late as last year, he made the wrong choice for the Presidential primary and

detailed 28-page questionnaire on his background and legal experience and then submit to an interview with the screening committee at the Senator's Third Avenue office.

The questioning? "Nothing unusual, nothing you wouldn't expect," said Mr. Nickerson, now a partner in a Manhattan law firm and still a Roslyn Harbor resident.

After that, came a tentative decision by the screening committee and then an intense investigation by the Federal Bureau of Investigation, which included inspection of tax returns and inquiries of the American Bar Association's judiciary committee.

All of this is considerably more rigorous screening than that undergone by a State Supreme Court judge, who is elected—or by a County Executive, for that matter. In the case of elected officials, the screening is essentially conducted by the opposition during a political campaign.

Mr. Nickerson, after graduation from Harvard College and Columbia Law School, served as a clerk for Judge Augustus Hand of the United States Circuit Court of Appeals and then for Harlan F. Stone, Chief Justice of the United States. Mr. Nickerson was a practicing lawyer when he entered politics and ran unsuccessfully for Nassau County Surrogate before being elected County Executive.

As a Federal judge, Mr. Nickerson will be sitting in the Eastern District Courthouse in Brooklyn.

He will be the second judge in the Nickerson family. His wife, Marie Louise, whom he met in law school, is a Nassau District Court judge—considerably lower in the judicial hierarchy. Nevertheless, such a husband-and-wife combination is a rarity. ■

ATT 1

ATTACHMENT 2

Martindale-Hubbell
Law Directory
in
Six Volumes

One Hundred and Ninth Annual Edition
1977

Volume IV

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MUDGE ROSE GUTHRIE & ALEXANDER (Continued)

District of Columbia Bar.

J.D. Clayton, born Sentinel, Oklahoma, September 3, 1934; admitted to bar, 1966, New York; 1971, District of Columbia. Yale University (B.A., 1957; LL.B., 1964); New College, Oxford University, England (D.Phil., 1957). *Member:* Association of the Bar of the City of New York; The District of Columbia Bar; New York State Bar Association.

Thomas S. Currier, born Shreveport, Louisiana, August 18, 1932; admitted to bar, 1956, Louisiana; 1967, Virginia; 1969, District of Columbia; 1970, New York. Princeton University; Stanford University; Tulane University of Louisiana (LL.B., 1956) *Member:* Louisiana State and American Bar Associations; Virginia State Bar; The District of Columbia Bar; American Law Institute.

Joseph C. Daley, born Girardville, Pennsylvania, October 17, 1934; admitted to bar, 1959, Virginia and District of Columbia; 1963, New York; 1968, New Jersey. University of Notre Dame (B.S., 1955); Yale University (LL.B., 1958). *Member:* Association of the Bar of the City of New York; Monmouth County, Virginia State, New Jersey State, Federal and American Bar Associations; The District of Columbia Bar.

Frederick M. Danziger, born New York, N.Y., March 12, 1940; admitted to bar, 1965, New York. Harvard College (B.A., 1962); Yale University (LL.B., 1965).

Martin J. Dockery, born Brooklyn, New York, December 18, 1938; admitted to bar, 1968, New York. Boston College (A.B., 1960); Catholic University of America (LL.B., 1967) *Member:* Association of the Bar of the City of New York; — illegible line — University (S.B., 1945; LL.B., 1950). *Member:* New York State and American Bar Association, The District of Columbia Bar.

Robert E. Ferdon, born Nyack, New York, November 1, 1932; admitted to bar, 1958, New York, 1972, District of Columbia. Harvard University (A.B., 1954); Columbia University (J.D., 1957) *Member* New York State and American Bar Associations; The District of Columbia Bar.

James G. Frangos, born Middletown, New York, April 9, 1934; admitted to bar, 19 59, New York, 1971, District of Columbia. Colgate University (A.B., 1955); Harvard University (LL.B., 195?). *Member:* Association of the Bar of the City of New York; The District of Columbia Bar; American Bar Association.

Leonard Garment, born Brooklyn, New York, May 11, 1924; admitted to bar, 1949, New York, 1967, District of Columbia. U.S. Representative to the Commission on Human Rights of the United Nations Economic and Social Council, 19??. *Member:* Association of the Bar of the City of New York; New York State and American Bar Associations; The District of Columbia Bar.

Randolph H. Guthrie, born Richmond, Virginia, November 5, 1905; admitted to bar, 1932 New York; 1966, District of Columbia. The City of Charleston, S.C. (B.S., 1925); Harvard University (LL.B., 1931). *Member:* Association of etc.

NEW YORK TIMES, THURSDAY, AUGUST 18, 1977

Nickerson and Former Prosecutor Named as Federal District Judges

By TOM GOLDSTEIN

Eugene H. Nickerson, former Nassau County Executive, and Charles P. Sifton, a former Federal prosecutor, have been nominated by President Carter to be Federal trial judges in the Eastern District of New York. The district takes in Brooklyn, Queens, Staten Island and Long Island.

The two lawyers, who have been cleared and approved by the Department of

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tion's committee on the Federal judiciary, now require confirmation by the Senate. That is considered to be almost automatic.

Both men were recommended for the district court judgeship by Senator Daniel Patrick Moynihan, a Democrat, who acted upon the advice of nonpartisan panel he established to evaluate judicial candidates.

Both men, who are now in private law practice, are graduates of Harvard College and Columbia University School of Law where they had distinguished academic records.

A lifelong Democrat, Mr. Nickerson, who is 59 years old and a resident of Roslyn Harbor, L.I., was elected County Executive of Nassau, an overwhelmingly Republican county, in 1961. He served three three-year terms, but failed in his ambition to be United States Senator or Governor.

After graduating from law school, Mr. Nickerson served as a clerk for Judge Augustus Hand of the United States Circuit Court of Appeals for the Second Circuit and then for Harlan F. Stone, chief justice of the Supreme Court. Since 1971, he has been a partner in the firm of Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soil.

Unusual Team

His wife, Marie-Louise, was elected a district court judge in Nassau in 1975, and when Mr. Nickerson takes the bench, they will be one of the few husband-and-wife judge teams in the country. They have four children.

Mr. Sifton, who is 42 years old, was

Eugene H. Nickerson

a staff lawyer on the Senate Foreign Relations Committee from 1962 to 1963. In 1968, he joined the office of the United States Attorney in the Southern District of New York. He remained in that office until 1969 when he became a partner in LeBoeuf, Lamb, Leiby & MacRae. His last position in the United States Attorney's office was chief appellate lawyer.

He and his wife, Elisabeth, a senior editor at Viking Press, live with their three children in Brooklyn.

Mr. Sifton and Mr. Nickerson fill vacancies created by the death last summer of Judge Orrin G. Judd and by the retirement of Judge John F. Dooling Jr. last year. Judge Dooling, who is on senior status, continues to hear cases.

Federal judges are paid $54,500 a year and hold lifetime appointments.

FUN FOR KIDS AT CAMP
VIA FRESH AIR FUND

A11 3

[22] **ATTACHMENT 4**

ANNEX A

To Decision by Judge Dooling of December 20, 1977

[23] **SAFIR DEPOSITION**

* * * * *

A I have offered it. It has not been requested of me.

Q Will you tell us what you have offered to them?

A Well, I haven't offered anyting specific to them. I have information which now based on the fact that this case is filed will be brought forward.

Q I now ask you to give us the information which you intend to bring forward.

A Well, upon information and belief, at some time in 1968 an arrangement was made between members of this group and the then Republican Party for the consideration of a considerable sum of money, to see to it that the subsidies which formed the basis of a complaint filed in 1968, in June, that that case, if the Republican Party was elected to office, would be made difficult for the plaintiff to succeed.

Q. May I ask you whether you have any documents to support this arrangement that the Republican Party had?

A I have no documents, but I have — that my information came from — I will put it this way. It came in 1973, by a telephone call from a newspaper reporter who asked
[24] me whether I knew anything and he mentioned by name one Spyros Skouras, Senior, had through someone in the Republican Party — and I am not sure whether it was

Mr. Stans that he mentioned by name or not — had arranged for this $7,000,000 to be paid over, over a period of time, to parties within the Republican Party for the purpose of settling or disposing of the antitrust case which was then filed by the Trustee in Bankruptcy of Safir Steamship Lines, and also my case, which at that time was in the nature of mandamus and which was the original action that I filed in 1968.

Q Could you tell me the name of the newspaper reporter?

A The name of the newspaper reporter was — his name was Louis Kohlmeyer, and I understand that he is a Pulitzer prize winning reporter who worked for the Wall Street Journal at the time I first knew him, and at the time he called to inquire about my information, about this information, was working for the Chicago Sun Times syndicate in Washington.

I told him at that time that like a husband whose wife was cheating, I would be the last to know the answer to his question, as to whether I had any information on the subject. My answer to him was no, but from that point on
[25] I knew that there would be a point in this litigation when under a False Claims Act amendment, in one case or in a new case filed as the one is here, that we are here today, filed last May, that new information would be supplied to the government in order to firm up the specific intent to defraud, which I felt as far as my case was concerned, this form of contribution would represent.

Q You say this inquiry was in 1973?

A Yes, sir.

Q Did you ever tell anyone in the government about the inquiry?

A No.

Q Why didn't you tell them?

A Because at that time I had no proof, and I had no basis on which to act, except and distinct from perhaps a Special Prosecutor's office and others who were interested at that time.

Mr. Kohlmeyer mentioned, however, if this will be helpful to you, Mr. Fort, and it might be, that certain of this information that he was basing his call to me on was based on leaks from the Special Prosecutor's investigation in the Nixon impeachment case. Make the most of it.

Q So that what you are saying is that the information in [26] essence was in the possession of the government at the time he called you because he had heard about it through leaks from the Special Prosecutor?

A If you think so. As I said, make the most of it. I don't think so. I don't think that there could be considered in the hands of the Attorney General, Department of Justice, since they were not involved in the Special Prosecutor's office.

Q Were there any other companies mentioned by this reporter?

A Not by name.

Q Now, return to the affidavit, Mr. Safir.

A Yes.

Q Paragraph 5, Page 7.

A I seem to have a problem there, Mr. Fort. Paragraph 5?

Q Five begins on Page 6 and it goes on to Page 7.

A I beg your pardon. Go right ahead, sir.

Q I would like to read you a sentence from that paragraph, starting off with "Thus, the conduct and transactions which were in issue before the Maritime Subsidy Board, as a result of the 1968 complaint and are now res judicata, are the same as which formed the basis for the proposed amended complaint."

* * * * *

[27] I did, and there was no answer and then he called me back at home.

Q Mr. Kohlmeyer?

A Yes. Now, I think I tried to get him back at the Wall Street Journal, but he wasn't there and then he called me and he told me that he was no longer with the Journal, but with the Sun Times syndicate.

Q Do you remember what time of day you were called by Mr. Kohlmeyer?

A I think it was late afternoon.

Where was your office at this time?

A No, he called me back at home.

Q What office did he call?

A He called the office at 41 Flatbush Avenue, Brooklyn.

Q And where were you living at that time?

A I was living in 8 Southview Lane in Kingspoint, New York. So there was a relay of calls from my office to my home.

Q What are you using to place — what information are you using to place the date of the call some time in September or October 1973?

A My own memory. Just my recall because of the nature of what was going on at that time, the events of the time
[28] and the timing of his statement that leaks are coming out of the Watergate Hearings and and he went further, he went further on this thing, I haven't told you all that he told me.

Q Before we get into the actual conversation, I am just going for information that — the information which you base your memory on the date of the conversation.

A I did not quite finish that question. I based it on the fact that the Watergate Hearings were on, that as a special prosecutor — no I wasn't even sure of that, that the Maritime, the head of the Maritime Commission had been called by the Watergate Committee.

He said at that time or a few days prior to that, Helen Bentley by name had been called by the Watergate Committee, so I placed the timing to be more accurate, perhaps others can too, to place it about the time that she was called before the Watergate Hearings.

Q So the conversation was after she had testified?

A After she testified and certain newspaper type leaks had emanated.

Q How did the conversation begin, who spoke first?

A He did. He said, do you remember me, I said, of course
[29] I remember you.

Q Could you give us the rest of the conversation as you remember it?

A Then he started to ask me questions. In fact, he said, have you felt that you are now having a very difficult time in making progress on your case and I said, I sure have felt it.

Q What was your understanding of what he meant by your case?

A The case that I was pursuing in the Maritime Subsidy Board, S 243, which was the outcome of my initial action in 68 C 643 in the Eastern District of New York.

Q He asked you a question and you responded. Was that your only response to the question?

A Yes. I said, why do you ask. That was my next question.

Q What was his response?

A He said, well, we are getting words and I am quoting now on the basis of a conversation of six years ago, so there is some license or liberty involved.

Q Is it six years or four years ago?

A Excuse, '73 is four years ago. I was thinking of the first one. Anyway, in connection with the one four years ago, I asked him, why do you ask and he said, because there
[30] are certain things emanating from the Watergate Hearings that show a relationship between your case and certain things that have happened in regard to campaign contributions and things like that.

He said, do you know of a payoff to Nixon at that time, he said, in the neighborhood of five and a half million dollars. I said, unheard of and I said, I would be the last to know if that were the case, becasue I mentioned in

connection with being like the cuckolded husband, always being the last to know.

He said, did I see any relationship between the City of Baltimore and the problems I was having. I said no. I said, why do you bring that up. He said, well, isn't it interesting to you that Andrew Gibson and Helen Bentley and also the Vice President of the United States comes from Baltimore.

I said, well, I cannot see what the relationship is. He said, well, there is evidence involved which we are hearing about that connects a payoff of this five and a half million dollars on your case, to the relationship of Andrew Gibson, who was a vice president of Prudential Grace Lines, and an employee of Skouras coming into the administration as the Maritime Administrator. A rela-
[31] tionship between Helen Bentley, a Baltimore reporter, becoming the head of the Federal Maritime Commission and the vice president.

So, I said, I still cannot see the relationship between the vice president and these people. He said, well, Skouras is a Greek. I said, that is right, of Greek extraction. He said, well, we hear it down here and this is what he said, that for the money that he paid into the Nixon administration to buy your case and the problems that you are having, he additionally recommended to Nixon at the time that he would like if his Greek-American compatriot becomes the vice president of the United States for the same five and a half million dollars.

I said, I find that very hard to believe, but that is a lot and if the next time I am in Washington, I will be very glad to discuss this thing further and I did. I came down to Washington soon thereafter. I came down, I called him

up and I met him in his office at the National Press Building.

Q Are we going onto another conversation?

A Yes. We are going onto another conversation.

Q All right. Let's go back to the telephone call to you. Did Mr. Kohlmayer tell you where he had gotten this information?

A No, he did not.

[32]

Q Did he indicate that he had gotten it from the testimony at the hearings?

A No, he did not. He indicated that it came in the form of a leak.

Q From —

A From one of the bureaus, apparently some agency, apparently the special prosecutor or the Ervin Committee at the time. I don't know, but it was a kind of a leak think that he was trying to check out, as to whether I knew anything about it.

Q You mentioned that he was using the pronoun, we have gotten this informaiton.

Do you know if he was working with anyone else in this investigation?

A I don't know.

Q Did he mention any other reporter's name?

A He did not.

Q Did he tell you when Mr. Skouras had been in contact with Mr. Nixon?

A He did not.

Q Did he mention any dates —

A Well, there is a determining factor in that, because Mr. Skouras died soon after Nixon came

* * * * *

magnificent sum out in order to presumably settle the
[33] antitrust case, and see to it that the subsidies not be withheld from the lines, from the steamship lines, who were then receiving them and who were apparently guilty of the violation.

Q Have you had any contacts with Mr. Kohlmeyer since your October or September, 1973 telephone conversation?

A Yes. I mentioned the fact I visited with him a month or two or three thereafter.

Q Do you remember if it was in 1973 or 1974?

A It might have been in early '74. I told him, I told you that he had an office, he was in this little office all by himself in that building.

Q What building is that?

A National Press Building. Apparently he was a pipe smoker, because the room smelled like a gas bin. You could not breathe in it.

I said, look, I am prepared to cooperate and help you on this thing, if you want some help. I am surprised that you hadn't gotten back to me earlier.

He had nothing much to say. He looked like he was unhappy with the whole conversation, and perhaps he shouldn't have called me in the first place.

So at that point I decided that was the end of it, at least
[34] for then, and I certainly — I had nothing further to go on. Everybody and his brother was investigating everybody else at that particular time, and I had my own problems, most of which were based on the ongoing fight with you people.

So I did nothing further about it.

Q Had you initiated this meeting?

A The second meeting, yes, it was me.

Q And do you remember what Mr. Kohlmeyer said?

A He said he would think about going further with it, and that he would get in touch with me, which he never did.

Q Did he ask you additional questions?

A Not a one.

Q Did he give you any additional information?

A I don't recall.

Q Did he give you any documents?

A No.

Q Do you remember him giving you any more details or mentioning any names?

A I said no. He was reluctant to, from being practically garrulous in the telephone conversaton, he was very reluctant to do any talking on that visit.

Q Do you remember how long this second meeting

* * * * *

ATTACHMENT 5

SAFIR DEPOSITION

A From the way he was asking me the questions, that he was not sure whether it was a $7,000,000 deal or a five
[45] million four deal, but there was a lot of money involved, and for that Mr. Skouras, as he said, was enabled to name the vice-president.

Q Have you discussed your telephone conversation with anyone, or this conversation we have been talking about, this telephone conversation?

A Yes, with several people.

Q Other than lawyers?

A Other than lawyers.

Q Who have you discussed this conversation with?

A With my Brother, William Safire.

Q What did you tell him about the conversation?

A Exactly what I told you.

Q In detail?

A In detail.

Q Do you remember when you told him about this conversation?

A As a matter of fact, I even discussed with him in connection with the possibility that the wiretap — he was — he was one of the fourteen people in the government in Washington, when he was assistant to the President, and I discussed it with him on the basis that perhaps the

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ATTACHMENT 6

No. 83-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARSHALL P. SAFIR,
Petitioner,

v.

ELIZABETH H. DOLE
in her representative capacity as
Secretary of Transportation,
Federal Respondent
and
LYKES BROS. STEAMSHIP CO. INC.
UNITED STATES LINES INC.
AMERICAN PRESIDENT LINES LTD.
FARRELL LINES INC.
MOORE McCORMACK LINES INC.
PRUDENTIAL LINES INC.
PRUDENTIAL-GRACE LINES INC.
Carrier Respondents.

PETITION FOR RE-HEARING

Marshall P. Safir
271 Grand Central Parkway
Floral Park, NY 11005
212-225-0210

June 7, 1984

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STATUTES

Ethics in Government Act of 1978 as amended 1983
Title 28 USC § 49 591 et seq.

Merchant Marine Act of 1936 as amended
Sec. 810 Title 28 USC § 1227

False Claims Act
Title 31 USC § 231 et seq.

CITATIONS

Safir v. Klutznick, 521 F. Supp 921 (DDC 1981)
Vacated *sub nom Safir v. Dole*, 718 F.2d 475 (1983)

Safir v. Blackwell, 579 F.2d 742 Cert. denied 441 US 943 (1979)

Frank Adams Electric v. Westinghouse, 146 F.2d 165 (8th Cir. 1945)

Root Refining v. Universal Oil, 169 F.2d 514 (3rd Cir. 1948) Cert. denied *sub nom Universal Oil v. Whitman*, 335 US 912 (1948)

County of Los Angeles v. Davis, 440 US 625 (1978)

SEC v. Medical Committee for Human Rights, 404 US 403 (1972)

Durfee v. Duke, 375 US 106 (1963)

Underwriters Assoc. v. N.C. Life Insurance, 455 US 691 (1982)

DeFunis v. Odegaard, 416 US 312 (1974)

Greater Boston Television v. FCC, 463 F.2d 268 (DC Cir. 1971) cert. denied *sub nom WHDH v. F.C.C.*, 406 US 950 (1972)

Hazel Atlas Glass v. Hartford, 322 US 238 (1944)

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House of Representatives Post Office and Civil Service Committee - Sub-Committee on Human Resources Report (Albosta) 1984

Wright and Graham on Evidence § 5122

Wright, Miller and Cooper Fed. Practice and Proc., Vol 13 § 3533

New York Times, June 4, 1984, page 16, section A

David Burnham, "Library of Congress — Facts? Let Them Eat Docudrama"

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PETITION FOR RE-HEARING

PETITION FOR REHEARING

The petitioner herein respectfully moves this Cou for an order (1) vacating its denial of the petition fo writ of certiorari, entered on May 21, 1984 and (2 granting the petition.

The petition herein is in accordance with Rule 58(2

in that it is confined to three intervening circumstances of substantial effect and on grounds material to these events not previously presented in the original petition. These events are:

1. On May 14, 1984 U.S. District Judge Harold Greene issued an opinion and order requiring the Attorney General to apply within seven days to a special division of the Court of Appeals (28 USC § 49) for the appointment of an Independent Counsel to investigate the possible role of several high administrative officials into the situation known as "Debategate."

2. On May 24, 1984 the sub-committee on human resources of the House Post Office and Civil Service Committee issued its "Albosta" report which had been authorized in June 1983 coordinately using evidence assembled by the F.B.I. for the Attorney General's own investigation of the theft of the Carter debate briefing papers. The Attorney General, in June, 1983 had acted under his responsibility as set forth in the Ethics in Government Act of 1978 as amended (28 USC §591 et.seq.)

3. On May 25, 1984 the Court of Appeals for the District of Columbia Circuit en banc agreed to hear oral argument on June 20,1984 on whether an Independent Counsel should be appointed to investigate how the Reagan campaign obtained the Carter briefing papers and whether the District Judge had acted within his authority in determining that the Attorney General had failed to take any steps mandated by Congress in the Ethics Act. A stay of Judge Greene's order is in effect.

4. The House Subcommittee (Albosta) majority report charged that there is "specific credible evidence" that a crime was committed in the Ronald Regan's 1980 campaign obtained the debate briefing papers and that some documents were taken from secured offices of the National Security Council or the Whit House situation room.

5. Judge Greene in his extensive opinion had also found "that there is unrebutted evidence (that) campaign document may have been stolen during the

1980 campaign transferred to the headquarters of the opposing political party as part of a large-scale intelligence operation".

6. On June 5, 1984 the Court of Appeals for the District of Columbia Circuit filed its decision in *Nathan v. Attorney General*, Dockets 83-1619 and 83-1643 which examined the extent of judicial power under the Ethics Act. The majority view of the panel on the issue of the standing of the plaintiff to sue under the Administrative Procedure Act 5 USC 701 et. seq. upheld such standing, finding only a lack of credible evidence in that case to sustain the action. Only Circuit Judge Robert Bork dissented on the issue of standing.

In the Safir litigation the plaintiff as will be seen infra, lost his False Claims Act suit to prove the existence of such credible evidence. Cases raising issues of this magnitude and which can now be seen as capable of repetition and therefore of evading review are not normally dismissed on the technicality of mootness. The Nathan decision therefore increases the likelihood of the plaintiff Banzhaf's success in the Court of Appeals on June 20, 1984 and the relevance of this petition to that action is real.

THE RELATIONSHIP OF "DEBATEGATE" TO THIS PETITION

The original petition in *Safir v Dole* et al stated at page 18:

> "The flexible contour of standing in Valley Forge may stretch to the arguable prudence of letting aging allegations of political mischief lie"

"Debategate" already proves the negative of such prudence.

The original petition (p.3) stated that one of the grounds for its filing was the dismissal of an apeal below from a district court grant to the Dept. of justice of a motion to quash a subpoena for discovery of certain Watergate Special Prosecutor Force (WSPF)

records where there was credible unrebutted evidence of a corrupt bribery conspiracy against this petitioner entered into in 1968 during the Nixon presidential election campaign by Richard Nixon to defeat the petitioner in this litigation.

A pre-condition of this arrangement was the requirement that Nixon accept Spiro Agnew as his vice-presidential running mate. The Dept. of Justice did not deny that such evidence existed and after this petitioner had brought a motion in the Court of Appeals on March 2, 1982, prior to the briefing of the appeal of the "quash", for dismissal of the governments own appeal of *Safir v Klutznick* 521 F. Supp. 921 (1981) on grounds of "unclean hands"[1] he stated first, that the government was aware of the campaign since 1973 and second:

> "The unconscionable nature of the bribery of an ex-president who despite televised protestations that he was "not a crook" has now been shown to be one, is of less import to this motion than the fact that the government through the Dept. of Justice whose task it was since the Nixon resignation to *keep its hands clean throughout the course of this litigation* did not do so by actively thwarting *Safir's* discovery rights and in reprehensible silence, covering up the evidence of criminal conspiracy in its files."[2]

The need for a subpoena for the Nixon Tapes and WSPF documents arose from testimony in a

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[1]. The government response to the motion was that "clean hands and peccabilities should form no part of the record on review." Nevertheless the federal defendant soon thereafter requested dismissal of its appeal on its own motion. See Petition for Cert 82-506.

[2]. The WSPF files will show that the breakin at the Democratic National Headquarters in the Watergate was directly linked to ex-President Nixon's need to know whether the Democrats knew of his 1968 sale of the vice-presidency. There is reason to believe that he was in receipt of an offer in early 1972 of $500,000 from an ethnic group in Boston, Mass. if he would "dump" Agnew in favor of Governor Volpe of Massachusetts (This proposed deal surfaced in the highly publicised but abruptly terminated "Mansuetto" trial in 1978 after Governor Volpe who was appointed

deposition of this petitioner in the Second Circuit in 1977 and the incorporation of relevant parts of it in an annex A to an unreported opinion and order of the USDCEDNY (Dooling, J.) Dec. 20, 1977. Acceptance of this new evidence was pre-requisite for the Second Circuit to affirm the dismissal of *Safir v Blackwell* 579 F2D 742, 746 ft. note 5 Cert. denied 441 US 943 (1979). The Court under 31USC § 232 is without jurisdiction only when the relator's information is already in the hands of the government.

Petitioner's need, *inter alia*, was based on the policy of Rule 301 of the Federal Rules of Evidence:

> "The plaintiff may not be asking the court to disturb the status quo, but rather to protect him from someone who has the power to affect the out-of-court situation without the aid of the Court. This extra-judicial impact is well recognized."
> Wright and Graham on Evidence Sec. 5122, p. 556.

Since possession of proof was in the hands of the government (the National Archivist) "as Bentham put it the burden should be cast on whom it would sit lightest." Instead the burden was placed on Safir. The court deprived him of discovery to meet the burden by denying access to the evidence. Those with the power to affect the out-of-court situation were given a free hand to savage the plaintiff at will. On the same day that the subpoena was first denied (March 29, 1978) petitioner's primary corporate holding was forced

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Ambassador to Italy by Nixon in 1973 denied knowledge of this offer under oath at the trial. The Boston Globe reported that the defendants were dumbfounded by their good fortune. The petitioner has for many years alleged that the large scale Nixon intelligence operation culminating in the Watergate break-in was preceded by a "plumbers" break-in at his own home in 1971 for evidence of Safir's suspected knowledge of the conspiracy through a possible leak from his brother William Safire a White House aide at the time. Neither Safir or Safire was aware of the conspiracy at the time but the thus far unexplained wire tap on the home phone of William Safire was ordered as early as 1969 by Henry Kissinger on Nixon's orders. There is reason to believe that this break-in was the genesis of the coding used by the plumbers in their later "capers" - i.e. Operation Sapphire, Ruby etc.

into bankruptcy through execution on a fraudulent judgment. When new evidence of governmental bad faith against petitioner was raised in 1980 the request for the subpoena was renewed.

The quash of this second subpoena was the subject matter of the appeal of *Safir v. Klutznick* 526F. Supp. 921 (DDC 1981) in Court of Appeals Docket 82-1064 which was dismissed on October 5, 1983 (See A-32, 33) on grounds that the decision in Dole I was a direct estoppel on petitioner's right to engage in further discovery under standing - mootness doctrine.

The question presented in Docket 82-1064 was:

> "When uncontroverted new evidence of prior conditions of fraud and corruption relevant to the integrity of government decision making under review on remand from this court is offered in good faith and where the evidence may be of controlling importance and a "core" change in the presumption of official regularity which goes to the very heart of the earlier mandate, did the District Court abuse discretion by rejecting the new evidence and quashing a subpoena for further discovery?"

In his opinion in Dole I, Judge Scalia held that "there is no more than speculation that the relief sought in this case will benefit the plaintiff." *The relief sought, by its denial, was a deprivation of due process risen to a constitutional level.*

The petitioner had the right to know who was responsible for the new and continuing injuries he sustained since 1968 and the right to the protection of the court during the litigation for redress of the earlier injury to his business and property in 1965-1967 in the violation of the Merchant Marine Act Section 810. Instead the courts below rejected the unrebutted evidence of the assault on the plaintiff and turned a blind eye as well to the uncontroverted sale of the vice-presidency and the desecration of the federal electoral process that it represented.

> "In no case do courts of equity reject evidence relevant to the integrity of the Chancellor's conscience or the public interest, whether

> relevant to issues presented in the pleadings or not, when such evidence is offered in good faith or may be of controlling importance." *Frank Adams Electric v. Westinghouse*, 146 F.2d 165, 168 (8th Cir. 1945). Also *Root Refining v. Universal Oil Products*, 169F.2d, 514,522 (3rd Cir. 1948) cert. denied *sub-nom Universal Oil v. Whitman* 335 US 912 (1948).

The District Court and then the Court of Appeals in rejecting the subpoena and then dismissing the appeal balanced the rights of the individual plaintiff in this litigation against the perceived greater benefit to the public interest in non-disclosure by a surcease of Watergate. By so doing the lower courts underestimated the danger of recurrence and, by silence, inadvertantly increased its likelihood. The court accepted the government's argument that the discovery of recorded Nixon tapes and WSPF documents was extraneous to the review action at hand, ignored the appeal to the conscience of the chancellor and the protection necessary to fend off the extra-judicial impact that the persistance of his desire to vindicate himself—and the public interest—had caused within an existing power-elite.[3] See Wright Miller & Cooper - Federal Practice and Procedure, Vol. 13 § 3533, p. 285-286 citing *Defunis v. Odegaard* 416US312 (1974) in regard to the exceptional situation abundantly in evidence in this petition to invoke the "capable of repetition" doctrine for a private plaintiff challenging both official *and* private defendants in actions *not* discontinued.

---

[3]. On Monday June 4, 1984 the New York Times in an article by David Burnham "Library of Congress-Facts? Let them Eat Docudrama" reveals how history can be distorted by self serving memoirists from this Nixon group aided and abetted by their former speech writers and other fourth estate press agents now considered by the passage of time, authentic sources for revisionist tracts on the man who appointed them. When members of this group remain in positions of official authority in those "estates" from which these others have departed, the real truth can continue to be suppressed as conflicts of interest in its dissemination arise and judicial recusals are eschewed. The Library of Congress under present interpretation of the relevant statutes is utilized as a Swiss bank by these people.

Closing the barn door by a finding of mootness after the briefing paper horse was stolen will, unless reversed, send a signal to potential wrongdoers that this court should abhor.

This petition is submitted for reconsideration on grounds that "the relief sought" will benefit the petitioner just as that the relief if granted in 1978 would, by the fruits of that discovery, have benefitted the 1980 electoral process. Debategate even in its present embryonic investigative state is testament to the failure of judicial spoon-feeding based on "prudential" considerations. The reluctance to reopen which was felt unlikely to recur for the benefit of a private litigant merely emboldened those unpunished Nixon political operatives, who had learned the tricks of the trade in the 1972 campaign, to use them in the 1980 campaign.

Without full disclosure there was *every* reason to believe that election violations would recur, See *S.E.C. v. Medical Committee for Human Rights*, 404 US 403 (1972) and that the interim relief of a diluted Ethics in Government Act (28U.S.C. § 591 et. seq.) could not completely and irrevocably eradicate the effects of a Watergate conspiracy that remained half-hidden in the National Archives. See e.g. *Indiana Employment Security Div. v. Burney*, 409 US 540 (1973) - generally see *County of Los Angeles v. Davis*, 440 US 625, 631-634 (1978).

The vacation of the Klutznick judgment, and with it the dismissal of the right to engage in continuing discovery, were in direct conflict with the settled doctrine of *Durfee v. Duke* 375 US 106 (1963) as affirmed in *Underwriters Assurance v. N. Carolina Life Ins.*, 455 US 691 (1982) and in flagrant misreading of *Defunis v. Odegaard*, 416 US 312 (1974) as discussed in Wright Miller & Cooper F. P & P supra.

These orders of the Court of Appeals were unwarranted exercises of judicial will for the purpose of severing the connection between Watergate and Debategate that the Safir litigation by its longevity and continued vitality had spanned. The surgery was botched.

All of the future consequences that should have

been avoided were instead nurtured by the success of official footdragging and the manifest ease by which Safir (and the public's) interest in uncovering the final chapter of Watergate could be defeated.

Therefore, the instant situation falls squarely within the well-established exception to the mootness doctrine of acts that are "capable of repetition, yet evading review." The question raised in the original petition as to whether the use of mootness doctrine as a jurisdictional bar in this case should be reconsidered.

Conclusion

It would be a sad commentary on the resiliency of a democratic society if the fear reported to have been expressed by the Speaker of the House last week that "the country cannot afford another Watergate" can paralyze the supreme keepers of our collective conscience when high official misconduct again is charged. *Greater Boston Television v. F.C.C.*, 463 F.2d 268, 278j-283 Cert. denied *sub-nom WHDH v. F.C.C.*, 406 US 950 (1972).

The issue raised here is no longer ancillary to an interpretation of implied private causes of action resulting from findings of violation of federal statutes for restitution and rescission, the denial of centiorari of which has no precedential value. These issues revert to the briefing process in the specific bankruptcy appeals in the Court below wherein oral argument will be heard in the October-November sitting barring technical dismissals beforehand.

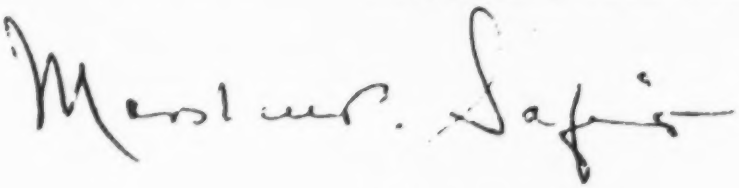
The issue here is the Court of Appeals' reluctance to uncover the fraud against itself. Justice Hugo Black has said:

> "Surely it cannot be that preservation of the integrity of the judicial process must always wait on the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must

> always be mute and helpless victims of deception and fraud.
> *Hazel-Atlas v. Hartford*, 322 US 238, 246 (1944)

Petitioner submits that where the Court would consider discretion the better part of valor, the Watergate that bred Debategate will breed Gate after Gate unless we allow the truth to happen. Petitioner prays that the court will reconsider.

Respectfully submitted

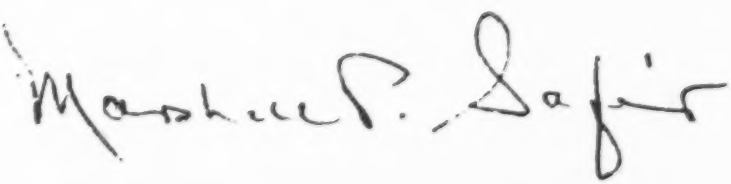


Marshall P. Safir

Date: June 7, 1984

CERTIFICATE OF GOOD FAITH

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 51(2) and 52(2) (3) of the Supreme Court effective June 30, 1980.



Marshall P. Safir

No. 90-02

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARSHALL P. SAFIR,

Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, UNITED STATES LINES, INC., Debtor, and S.S. AMERICAN LANCER, S.S. AMERICAN AQUARIUS, S.S., AMERICAN APOLLO, S.S. AMERICAN LYNX and S.S. AMERICAN ASTRONAUT, their engines, tackles, apparels, furnishings, equipment and appurtenances, in rem,

Respondents.

PETITION FOR REHEARING

MARSHALL P. SAFIR
271 Grand Central Parkway
Floral Park, New York 11005
(718) 225-0210

October 24, 1990

WILLIAMS PRESS, INC. — 1717 K STREET NW, WASHINGTON, D.C. 20006 — 223-1220

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IN THE

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OCTOBER TERM, 1989

No. 90-02

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Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, UNITED STATES LINES, INC., Debtor, and S.S. AMERICAN LANCER, S.S. AMERICAN AQUARIUS, S.S., AMERICAN APOLLO, S.S. AMERICAN LYNX and S.S. AMERICAN ASTRONAUT, their engines, tackles, apparels, furnishings, equipment and appurtenances, in rem,

Respondents.

PETITION FOR REHEARING

The petitioner respectfully moves this Court for an order vacating the order of denial of certiorari (Rehearing Appendix RA-1a) and granting the petition. The petition for rehearing is timely under Rule 44.2.

After the filing of the original petition in this docket, the petitioner received two communications from the Court of Appeals for the Second Circuit, both of which are duplicate copies

of the Order and Mandate (RA 2a-5a) denying a Safir motion for a writ of mandamus under Rule 21 Fed. R. of App. Proc. in *In Re Marshall P. Safir*, Docket 89-8008. The motion had been filed on January 19, 1989 and decided on February 21, 1989. Since the duplicate copies of the eighteen-month-old order had not been requested by the petitioner and the petition had already been filed on June 28, 1990, the mailings of June 25 and June 26, 1990 (RA 3a, 5a(by the Clerk were at first a curiosity invoking mere speculation.

However, since the denial of certiorari on October 1, 1990, these documents have become of substantive relevance as grounds for rehearing. Regardless of whether the mailings were intended to correct a mistake by a conscientious deputy clerk, or a conscious manifestation of sacerdotal judicial guidance, the existence of a motion for so drastic a remedy as a Petition for Writ of Mandamus to a district judge in an effort to gain access to the courts to assert maritime lien claims held out the possibility that the failure of the original petition might inherently lay in the dearth of documentary evidence furnished to support the burden of overturning a finding of laches under the discretionary powers of a judge in an admiralty proceeding.

Closer examination of the record before Judge Richard Owen shows not only a copy of the denied motion before the Second Circuit in Docket 89-8008 but also an earlier Petition for Writ of Mandamus filed in 1987 on the same subject of compelling the district court judge to allow this claim to be heard.

Petitioner refers to these extraordinary efforts to move his admiralty claims forward as being in the record before Judge Owen at least one month before the hearing on intervention took place. They were filed by counsel for Prudential as exhibits attached to the Affidavit of Judy G. Z. Liu of June 13, 1989 in Support of Memorandum of Law in Opposition to Mo-

tion to Intervene, N.R. 238 (RA 6a-8a) including relevant Exhibit E, Safir Petition for Mandamus, October 21, 1987 (RA 9a-10a) and Exhibit F(1)(RA 11a-12a) Safir Motion and Exhibit F(2) (RA 14a-19a) Safir Amendment in Support of Motion for Leave to File a Petition for Mandamus of January 19, 1989. A copy of the Order of Denial was attached (RA 20a).

Exhibit E to the Liu Affidavit — Petition for Mandamus in 1987 was the Safir request for an order to the District Court to relax the draconic injunction in *Safir v. USL, et al.*, 616 F.Supp 613 (EDNY 1985) to conform with the modification of that injunction mandated by the Second Circuit in *Safir v. USL, et al.*, 792 F2d 19, 25 (1986), *cert. denied*, 479 US 1099 (1987). Petitioner, by affidavit "had set forth the reasons why expeditious consideration is necessary to protect his equitable interest in the traceable assets of the contract violators in the District Courts, Bankruptcy Courts and *Admiralty Courts* from bar dates and other limitations." (RA 9a)

Exhibit F to the Liu Affidavit included both the Notice of Motion in *In Re Marshall P. Safir* January 1, 1989 and the Safir Affidavit dated January 9, 1989. The Notice of Motion raised the question

> "Whether an existing district court injunction should be suspended or vacated during adjudication in the Court below so that the plaintiff can protect his claim of a maritime lien in admiralty or bankruptcy courts where the proceeds of *in rem* vessel sales are in jeopardy of being turned over to lien claimants of lesser priority than his own. In this regard an appeal of the decision of Judge Richard Owen is now *sub judice* in this Court in Prudential Insurance Co. of America v. S.S. American Lancer, et al Docket 88-5789 (General Electric Capital Corp., Appellant) (RA 13a)

In the Safir Affidavit of January 9, 1990, which Ms. Liu had ıcluded in her submission before Judge Owen on June 13, 989, this petitioner had stated in pertinent part:

> Para. 10. Affiant, moreover, was informed by Hart and Wechsler's "Federal Courts and the Federal System" 2nd Ed., p. 1571, that the strongest case for mandamus was one in which the trial judge acted in a way to prevent the controversy from being adjudicated and thus would defeat appellate review, e.g. a refusal to allow the case to proceed. When affiant attempted to file the petition for relief under Rule 21 in this Court on October 21, 1987, the Clerk acting under direction of the August 12, 1987 ORDER In *Safir* v *ICC* rejected the filing. The issue of finality for the purpose of review by Appeal or mandamus was thus moot.
>
> Para. 11. The requirement for expedition was urgent in October 1987 because on September 30, 1987 affiant had received a Notice of Bar Date in the Chapter XI proceeding of US Lines Inc. Debtor in Possession — an order of the Bankruptcy Court requiring that proof of claim or maritime lien claim under 46 USC §953(a)(b) or equitable interest claim under 11 USC §541(d) had to be filed on or before November 25, 1987.
>
> Para. 12. This foreclosed a hearing by the District Court and summary evaluation of the validity of new complaint essential and, if found meritorious, to remove the existing injunctive restraint on the affiant to pursue his remedy in both bankruptcy and admiralty forums where liquidations of assets — particularly those of defendant US Lines were taking place. *Archawski* v *Hanioti*, 350 US 532 (1956).
>
> Para. 13. Admiralty court sales of the Lancer vessels began on November 17, 1987 and continued

through May 6, 1988. The proceeds of the sales of the last eight Lancers are the subject of the appeal by General Electric Capital Corp. in *Prudential Insurance Co.* v *American Lancer et al* — Docket 88-7589 in this Court (Kearse, Cardamone & Winter CJ's) the proceeds of approximately $60,000,000.00 remain in *custodia legis* in the Southern District (Owen, J.).

Para. 14. This affiant had only on December 16, 1988 been able to inform this Court that this claim represented a priming maritime lien as to the wage differential subsidies paid during the violative period because it arose before the recordation and endorsement of the Prudential and GECC mortgages. The construction differential subsides claimed in the complaint are not considered maritime claims under admiralty law.

Para. 15. In this regard the instant motion for leave to file a petition for a writ under Rule 21 of the Federal Rules of Appellate Procedure is necessary and appropriate in aid of this Court's jurisdiction. *FTC* v *Dean Foods Co.*, 384 US 597, 603-604 (1966). The nature of the existing District Court injunction against the affiant precluded notice to Judge Owen of the existence of the lien which would have profoundly altered his decision in *Prudential* v *American Lancer et al* because his assumption of equitable principles in the otherwise strictly constructed admiralty jurisdicion was based on lack of knowledge that a third-party interest of a priming nature was being prejudiced thereby.

Para. 16. The phrase "in aid of appellate jurisdiction" has not been construed to mean that the *Safir* v *US Lines et al* case must presently be pending in the Court issuing the writ. It is enough that the

> Lancer appeal is now sub-judice because by the time the case will arrive here irreparable damage to affiant's tracing maritime lien claim will have occurred had appellate review of Judge Owen's final order resulted in the release of the Lancer proceeds to Prudential or General Electric beforehand.
>
> Para. 17. It is not enough that prejudice might hopefully have been mitigated by the judicial notice afforded the panel in the Prudential-General Electric appeal in Docket 88-7589 by the facts stated in the Safir *amicus* motion since denied. The Lancer proceeds which are the subject matter of that appeal can only be protected for the benefit of this affiant's third-party interest as the holder of a priming maritime lien thereto by this Court's recognition of the linkage of the Writ of Mandamus to that appeal in its jurisdiction. (RA 18a-20a)

Judge Owen based his findings of laches on the grounds that Safir "could have lifted what you (Safir) believed to be an injunction against you before Judge Nickerson two or three years ago—you could have come before me at any time—this matter coming before me on this very last day of this proceeding is clearly out of time (See Original Petition, p. 18)

All of these findings were in error. The first error based on the mandamus petitions attached as exhibits to the Liu Affidavit and the third based on docket sheet entries in the ongoing proceeding to and including May 18, 1990. The proceedings have remained open in Docket 87-5842 SDNY with motions for reargument on certain claims by Prudential and U.S. Lines still outstanding as of the June 4, 1990 by the certified true copy of the docket sheet appended hereto (RA. p. 24a). The denial of the Writ of Mandamus to Judge Nickerson of February 21, 1989, in Docket 89-8008 was indisputable proof that Safir's efforts to compel his maritime lien claims to adjudication against

U.S. Lines ships and the vessels of the other offending subsidized carriers could not have been pursued until Judge Nickerson belatedly (in May 1989) complied with the Second Circuit modification of the injunction mandated in 1986.

Furthermore, contrary to the second of Judge Owen's findings: "You could have come before me at any time"; the denial of the writ in Second Circuit Docket 89-8008 was clear evidence that petitioner could have done so only at the risk of severe civil sanction. In short, all of the exhibits attached to the Liu Affidavit which counsel for Prudential placed before Judge Owen (and for which petitioner herewith makes grateful acknowledgement) represent the only legal recourses available and known to him during the period he was barred by the unmodified injunction of 1985. Given the facts before him, Judge Owen's finding that "you could have lifted — the injunction two or three years ago" is unfathomable.

Moreover, the District Court finding of laches does not meet this Court's teachings as to the equities of the parties in *Gardner v. Panama Railroad*, 342 U.S. 29, 31 (1951). The *Gardner* case, as discussed in "The Law of Admiralty," Gilmore & Black, Chap. IX, p. 772, is similar to the Safir litigation in that "*Gardner* obviously involved an exceptionally diligent plaintiff caught in a series of procedural traps not of her own making." Nor does the District Court findings meet its own circuit's holding in *Larios v. Victory Carriers*, 316 F.2d 62, 67 (2nd Cir. 1963) where a weak excuse might suffice if there has been no prejudice and an exceedingly good one (as this petition hopefully has made clear) might still do if there has been some. In this case there been no prejudice for two reasons. First, because the proceeds of the ship sales could not have been distributed to Prudential during the period when the *General Electric* appeal was being decided in the Second Circuit. *Prudential Insurance Co. of America v. S.S. American Lancer*, 870 F.2d 67 (2nd Cir. 1989). The mandate issued

in May 1989. Second, there could be no finding of prejudice until the issue of fraud charged by Safir had been determined.

CONCLUSION

Petitioner prays that this Court will grant rehearing. The adventitious, unsolicited and arcane receipt of the duplicate copies of the February 21, 1989 order from the Second Circuit has caused the petitioner to recall that the documents appended hereto were known to the District Court Judge sitting in admiralty when he denied intervention. Based on these substantive documents which describe petitioner's diligent efforts to assert his claim to a maritime lien by the drastic method of mandamus, a finding of laches was incompatible, antithetical and inequitable.

Respectfully submitted,

Marshall P. Safir
271 Grand Central Parkway
Floral Park, New York 11005
Petitioner

October 24, 1990

CERTIFICATE OF GOOD FAITH

I, Marshall P. Safir, hereby certify that this petition is filed in good faith and not for purposes of delay.

_____

Marshall P. Safir

Ocober 24, 1990

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 1, 1990

Mr. Marshall P. Safir
271 Grand Central Parkway
Floral Park, NY 11005

Re: Marshall P. Safir
v. Prudential Insurance Company of America, et al.
No. 90-2

Dear Mr. Safir:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

United States Court of Appeals
FOR THE SECOND CIRCUIT

DUPLICATE	:	89-8008
	:	*Docket Number*
IN RE MARSHALL P. SAFIR	:	NICKERSON EDNY/85 Civ. 0864
	:	**NOTICE OF MOTION**
	:	*state type of motion*
	:	for Leave to File Petition for
Use short title	:	Writ of Mandamus

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
JAN. 19 1989
ELAINE B. GOLDSMITH, CLERK

MOTION BY: *(Name, address and tel. no. of attorney in charge of case)*

MARSHALL P. SAFIR, pro se
271 Grand Central Parkway
Floral Park, NY 11005
(718) 225-0210

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

GILMARTIN, POSTER & SHAFTO
SHEA & GARDNER
FOLEY HOAG & ELIOT
SIDLEY & AUSTIN
WEIL GOTSHAL & MANGES
FREEHILL, HOGAN & MAHAR
KOMINERS & FORT
(See Cert. of Service)

JUDGE EUGENE NICKERSON

Brief statement of the relief requested:

Mandamus for order to allow summons to be served and case to proceed to summary judgment.

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

UNITED STATES COURT OF APPEALS
SECOND CIRCUT
FILED
FEB 21 1989
ELAINE B. GOLDSMITH, CLERK

2/21/89

/s/ Jon O. Newman
/s/ A. Kearse
/s/ Roger Miner

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NEW YORK, N. Y. 10007

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Marshall F. Safir
271 Grand Central Parkway
Floral Park, NY, 11005

re: 89-8008

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United States Court of Appeals
FOR THE SECOND CIRCUIT

)UPLICATE	:	89-8008
	:	*Docket Number*
) RE MARSHALL P. SAFIR	:	NICKERSON EDNY/85 Civ. 0864
	:	**NOTICE OF MOTION**
	:	*state type of motion*
	:	for Leave to File Petition for
se short title	:	Writ of Mandamus

ITED STATES COURT OF APPEALS
COND CIRCUIT
ED
. 19 1989
AINE B. GOLDSMITH, CLERK

OTION BY: *(Name, address and tel. no. of attorney in charge of case)*

MARSHALL P. SAFIR, pro se
271 Grand Central Parkway
Floral Park, NY 11005
(718) 225-0210

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

GILMARTIN, POSTER & SHAFTO
SHEA & GARDNER
FOLEY HOAG & ELIOT
SIDLEY & AUSTIN
WEIL GOTSHAL & MANGES
FREEHILL, HOGAN & MAHAR
KOMINERS & FORT

(See Cert. of Service)

JUDGE EUGENE NICKERSON

ief statement of the relief requested:

Mandamus for order to allow summons to be served and case to proceed to summary judgment.

ORDER

ndly leave this space blank

T IS HEREBY ORDERED that the motion be and it hereby denied.

A TRUE COPY
ELAINE B. GOLDSMITH
/s/ Elaine B. Goldsmith
Clerk 2/21/89

/s/ Jon O. Newman
/s/ A. Kearse
/s/ Roger Miner

TED STATES COURT OF APPEALS
SECOND CIRCUT
FILED
FEB 21 1989
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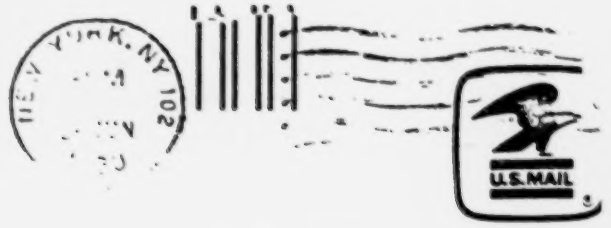

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Marshall P. Safir
271 Grand Central Parkway
Floral Park, NY, 11005

re: 89-8008

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N THE UNITED STATES COURT OF APPEALS
OR THE SECOND CIRCUIT

'HE PRUDENTIAL INSURANCE :OMPANY OF AMERICA Plaintiff, -against- ;.S. AMERICAN LANCER, ;.S. AMERICAN AQUARIUS, ;.S. AMERICAN APOLLO, ;.S. AMERICAN LYNX, and ;.S. AMERICAN ASTRONAUT, heir engines, tackle, apparel, urnishings, equipment and ppurtenances, *in rem*, Defendants.	:	IN ADMIRALTY 87 CIV 5842 (RO)
AND ALL RELATED CLAIMS TO /ESSELS AND COMPLAINTS-IN- NTERVENTION.	:	

AFFIDAVIT OF JUDY G.Z. LIU IN SUPPORT OF MEMORANDUM OF LAW OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA IN OPPOSITION TO MOTION TO INTERVENE FILED BY MARSHALL P. SAFIR

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10151
(212) 310-8000

-and-

McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400

Co-Attorneys for Plaintiff
THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA

STATE OF NEW YORK)
) s.s.:
COUNTY OF NEW YORK)

JUDY G.Z. LIU, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before this court and am a member of the firm of Weil, Gotshal & Manges, co-attorneys of record herein for the plaintiff,The Prudential Insurance Company of America ("Prudential"). I am one of the attorneys primarily responsible for this matter and as such I have personal knowledge of the matters set forth herein and could competently testify thereto if called and sworn as a witness.

2. Appended hereto oas Exhibit "A" is a copy received by affiant of the Application of Marshall P. Safir to the Honorable Thurgood Marshall, Circuit Justice for the United States Court of Appeals for the Second Circuit, filed with the Clerk of the Supreme Court of the United States on June 29, 1988, in *Marshall Safir v. Interstate Commerce Commission*, Case No. 87-7222 in the Supreme Court of the United States. The Application Sought an order directing the Clerk of the Bankruptcy Court for the Southern District of New York to withhold the disbursement of proceeds forom the sale of the Lancer Vessels.

3. Appended hereto as Exhibit "B" is a copy received by affiant of a letter dated July 5, 1988, from the Office of the Clerk of the Supreme Court of the United States addressed to Marshall P. Safir denying Mr. Safir's request for emergency relief in *Marshall Safir v. Interstate Commerce Commission*, Case No. 87-7222.

4. Appended hereto as Exhibit "C" is a copy received by affiant of a Motion to Intervene under Rule 29 filed by Mr. Safir, dated December 16, 1988, in Docket No. 88-7589 in the United States Court of Appeals for the Second Circuit entitled *The Prudential Insurance Co. of America v. S.S. AMERICAN LANCER, et al.* (the "Second Circuit Proceedings").

5. Appended hereto as Exhibit "D" is a copy received by affiant of the Notice of Motion For Leave To File An Amicus Curiae Brief filed by Marshall P. Safir in the Second Circuit Proceedings on December 16, 1988, with Order of the Second Circuit filed December 21, 1988 denying Mr. Safir's Motion.

6. Appended hereto as Exhibit "E" is a copy received by affiant of a Motion of Marshall P. Safir For Leave To File Petition For Writ of Mandamus in the Second Circuit Proceedings.

7. Appended hereto as Exhibit "F" is a copy received by affiant of Notice of Motion For Leave To File Petition For Writ of Mandamusfiled by Marshall P. Safir in the Second Circuit Proceedings on January 19, 1989, with Order of the Second Circuit filed February 21, 1989, denying Mr. Safir's motion.

Sworn to before me this
13 day of June, 1989.

/s/ IrisJ. Rivera
Notary Public

/s/ Judy G.Z. Liu
Judy G.Z. Liu

B68535.30/3-84

EXHIBIT E TO LIU AFFIDAVIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

x----------x

IN RE: MARSHALL SAFIR	:	PETITION FOR A WRIT
	:	MANDAMUS
PETITIONER	:	
x----------x		CA DOCKET: _____

This Petition is filed under the jurisdiction of this Court (28USC 1651) and in accordance with Rule 21 of the Federal Rules of Appellate Procedure. The Writ of Mandamus is necessary because District Court Judge Eugene Nickerson has without a hearing, refused to grant the petitioner leave to file a new claim for a remedy based on occurrences in 1965-1966 found to have vilated Section 810 of the Merchant Marine Act 1936 (46 USC § 1227).

This Court in *Safir* v. *U.S. Lines Inc.* et al 792F2d 19, 25 (2nd Cir. 1986) cert. denied 107 S. CT. 1323 (1987) modified an injunction ordered by Judge Nickerson for the purpose of avoiding the foreclosure of what might be a meritorious claim by this petitioner. TheDistrict Court has blatantly ignored the mandate in rejecting a motion for leave to file a new claim not only without a hearing but without any explanation of reasons why the proposed complaint was not meritorious. The motion was brought on by Order to Show Cause which was denied, Att. 1 * * *

* * * equitable interest in the traceable assets of the contract violators in the District Courts, Bankruptcy Courts and Admiralty Courts, from bar dates and other time limitations. The existing injunction in which Judge Nickerson refuses to accept this Court's modification, precludes such protective measures

while petitioner stands directly in jeopardy of tolling statutes awaiting the outcome of en banc deliberation in the ICC matter and the outcome of this petition.

For these reasons, it is clear that this court's mandate modifying Judge Nickerson's injunction has been flouted.

Under the circumstances here a recall for clarification of the mandate falls short of the relief required. See *Vendor Co.* v *Lecktro-Vend Corp.* 434 US 425 (1978). Indeed the willful disregard of the modification mandated by this Court in *Safir* v. *USL et al.* supra p. 25 of Judge Nickerson draconic injunction in *Safir* v. *USL et al.* 616F.Supp. 613 (1981) should compel the action the Court found appropriate in *Reserve Mining* v. *Lord* 529 F2d 181 (8th Cir. 1976).

"Upon an application for a Writ of Mandamus or a new appeal, it is for this Court to construe its own mandate and act accordingly". *In re Sanford Fork and Tool Co.* 160 US 247, 255, 256 (1895). Accordingly, to avoid substantial injustice, petitioner prays that this Court ***en banc*** recall the mandate, take such action as to modify the mandate to remand the case to the district court with directions that the chief judge assign the remaining proceeding on the meritorious claim to a different judge (cf *Reserve Mining* v. *Lord* supra) and to vacate the injunction against the petitioner for the purpose of filing his related claims in timely fashion in any federal court as a matter of right.

October 21, 1987

s/s Marshall P. Safir

Marshall P. Safir

CERTIFICATION

I certify that I have this 21st day of October served copies of this petitioner and the Rule 27(i) motion on Judge Nickerson and all counsel of record in this proceeding by first class mail postage pre-paid.

/s/ Marshall P. Safir
Marshall P. Safir

Haight Gardner Poor & Havens
One State Street Plaza
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EXHIBIT F (1) TO LIU AFFIDAVIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re MARSHALL P. SAFIR Petitioner, and	87-3007
MARSHALL P. SAFIR, Plaintiff-Appellant - v - INTERSTATE COMMERCE COMMISSION, et al	**MOTION** 87-4037

MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS TO A DISTRICT COURT JUDGE

MARSHALL P. SAFIR respectually moves this Court for leave to file a Writ of Mandamus to Judge Eugene Nickerson of theDistrict Court for the Eastern District of New York to require the district judge to authorize the Clerk of the Eastern District to issue summons to the defendants in the new Complaint in *Safir* v *US Lines et al* DCEDNY Docket 85-864 which complaint was filed and entered by the Clerk on October 15, 1987. The Writ is necessary because the effect of refusal to issue the summons is to prevent the case from proceeding and thus defeat appellate review.

The first question involved in *Safir* v *US Lines et al* is whether, based on an affirmed judgment of liability of the defendants for a violation of their subsidy contracts where the plaintiff was the intended third-party beneficiary, the plaintiff's claim is meritorious and that he is entitled to an accounting and payment of the unjust enrichment gained by the defendants at his expense.

The second question is whether an existing district court injunction should be suspended or vacated during adjudication in the Court below so that the plaintiff can protect his claim of a maritime lien in admiralty and/or bankruptcy courts where the proceeds of *im rem* vessel sales are in jeopary of being turned over to lien claimants of lesser priority than his own. In this regard an appeal of the decision by Judge Richart Owen of the District Court SDNY is now sub-judice in this Court in *Prudential Insurance Co. of America* v *American Lancer et al*, Docket 88-5789 (General Electric Capital Cor. - Appellant).

WHEREFORE applicant moves this Court for permission to file a Petition for Writ of Mandamus under Rule 21 of the Federal Rules of Appellte Procedure or for such other relief as the Court finds appropriate in the matter.

Respectfully submitted,

Dated: January 9, 1989

MARSHALL P. SAFIR
271 Grand Central Parkway
Floral Park, NY 11005
(718) 225-0210

EXHIBIT F (2) TO LIU AFFIDAVIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re MARSHALL P. SAFIR Petitioner, and	87-3007
MARSHALL P. SAFIR, Plaintiff-Appellant - v -	**AFFIDAVIT**
INTERSTATE COMMERCE COMMISSION, et al	87-4037

AFFIDAVIT OF MARSHALL P. SAFIR IN SUPPORT OF HIS MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS TO THE DISTRICT COURT

MARSHALL P. SAFIR, being duly sworn deposes and says:

1. On March 24, 1988 this Court enjoined the affiant Marshall P. Safir from filling any motion, petition, appeal or request for relief of any sort concerning US Lines Inc. and other Companies or entities engaged in the transportation of goods by sea without having obtained leave of this Court for such filing. Accordingly, the affiant has moved for such leave and this affidavit is filed in its support. The Order of March 24, 1988 is Att. A hereto.

2. Affiant has since August 12, 1987 been enjoined from filing any papers in any matter in this Court until he furnished satisfactory evidence of payment of a $5,000.00 damage judgment to CSX Corp. in *In Re Marshall P. Saifr* and the related action in *Safir* v *Interstate Commerce Commission, CSX Corp. and Sea Land Service Corp.*, Dockets 87-3007 and 87-4037.

3. From August 12, 1987 until December 9, 1988 affiant was financially unable to pay the award to CSX and indeed had been forced to petition for both mandamus and certiorari to the Supreme Court therefrom in *forma pauperis*. On December 9, 1988 affiant was able to pay the award.

4. The ability to pay was occasioned by the adventitious receipt of a check from the Trustee of Sapphire Steamship Lines countersigned by Bankruptcy Judge Cornelius Blackshear on November 17, 1988 for a partial return of equity twenty-one years after the destruction of the business by the defendant operating differential subsidy contractors.

5. The effect of the inability to gain access to this Court in the ensuing 16 months has had harmful consequences which only this Court can reverse and there is now good cause to do so. This Court in *Safir* v *US Lines et al*, 792 F2d 19, 25 (2nd Cir 1986) cert. denied 107 S.Ct. 1323 (1987) modified a District Court injunction against any filing by the affiant of federal court actions for relief arising out of the violation of Section 810 MMA '36 so as not to foreclose a meritorious remedy other than on false claims or implied statutory right of action grounds. District Court leave for such filing was prerequisite.

6. On October 14, 1987 affiant moved the District Court by Order to Show Cause for leave to file such quasi-contract remedy for breach of contract as a third-party beneficiary against US Lines and the other defendants. This was set forth as Court II of a complaint which included a conspiracy cause

of action under 42 USC §1985(e). OSC and the Affidavit of October 14, 1987 is ATT. 1 hereto; the Complaint is ATT. 2 hereto; and the Memorandum of Law is ATT. 3 hereto.

7. The District Court (Nickerson, J.) denied the Order to Show Cause but authorized the Clerk to file the Complaint *(lis pendens)* without the issuance of summons to the defendants. The Civil Docket Continuation sheet in *Safir* v *US Lines et al*, Docket No. 85-864 EDNY is ATT. 4 hereto.

8. While the filing of the complaint satisfied affiant's statute of limitation concerns — such filing was necessary to be timely under the six-year statute for actions to enforce a constructive trust in New York under CPLR 213(2) — the refusal to issue the summons under Rule 4 of the F.R.C.P. created a situation where action on the merits of the filed complaint could not go forward with process incomplete.

9. Furthermore, the appealability of the denied order to show cause was a matter of concern since Rule 4(a)(b) of F.R.C.P. is procedural in nature and yet had the potential for final and irreparable effect on affiant's ability to protect his interest in the proceeds of asset sales and liquidations of the defendants in forums where the existing modified injunction precluded representation of affiant's interests. Under these "tentative and informal" circumstances — but unlike *Cohen* v *Beneficial Industrial Loan Corp.*, 337 US 541 (1949), mandamus afforded the only appropriate remedy where finality could not be established.

10. Affiant, moreover, was informed by Hart and Wechsler's "Federal Courts and the Federal System" 2nd Ed., p. 1571, that the strongest case for mandamus was one in which the trial judge acted in a way to prevent the controversy from being adjudicated and thus would defeat appellate review, e.g. a refusal to allow the case to proceed. When affiant attempted to file the petition for relief under Rule 21 in this Court

on October 21, 1987, the Clerk acting under direction of the August 12, 1987 ORDER In *Safir* v *ICC* rejected the filing. The issue of finality for the purpose of review by Appeal or mandamus was thus moot.

11. The requirement for expedition was urgent in October 1987 because on September 30, 1987 affiant had received a Notice of Bar Date in the Chapter XI proceeding of US Lines Inc. Debtor in Possession — an order of the Bankruptcy Court requiring that proof of claim or maritime lien claim under 46 USC §953(a)(b) or equitable interest claim under 11 USC §541(d) had to be filed on or before November 25, 1987. See rejected Petition for Writ of Mandamus dated October 21, 1987 ATT. 5 hereto.

12. This foreclosed a hearing by the District Court and summary evaluation of the validity of new complaint essential and, if found meritorious, to remove the existing injunctive restraint on the affiant to pursue his remedy in both bankruptcy and admiralty forums where liquidations of assets — particularly those of defendant US Lines were taking place.

13. Admiralty court sales of the Lancer vessels began on November 17, 19878 and continued through May 6, 1988. The proceeds of the sales of the last eight Lancers are the subject of the appeal by General Electric Capital Corp. in *Prudential Insurance Co.* v *American Lancer et al* — Docket 88-7589 in this Court (Kearse Cardamone & Winter CJ's) the proceeds of apprxoimately $60,000,000.00 remain in *custodia legis* in the Southern District (Owen, J.).

14. This affiant had only on December 16, 1988 been able to inform this Court that this claim represented a priming maritime lien as to the wage differential subsidies paid during the violative period because it arose before the recordation and endorsement of the Prudential and GECC mortgages. The construction differential subsides claimed in the complaint are

not considered maritime claims under admiralty law. See Safir motion for leave to file a brief as *Amicus Curiae* in Docket 88-7589 denied December 21, 1988. ATT. 6 hereto.

15. In this regard the instant motion for leave to file a petition for a writ under Rule 21 of the Federal Rules of Appellate Procedure is necessary and appropriate in aid of this Court's jurisdiction. *FTC* v *Dean Foods Co.*, 384 US 597, 603-604 (1966). The nature of the existing District Court injunction against the affiant precluded notice to Judge Owen of the existence of the lien which would have profoundly altered his decision in *Prudential* v *American Lancer et al* because his assumption of equitable principles in the otherwise strictly constructed admiralty jurisdicion was based on lack of knowledge that a third-party interest of a priming nature was being prejudiced thereby.

16. The phrase "in aid of appellate jurisdiction" has not been construed to mean that the *Safir* v *US Lines et al* case must presently be pending in the Court issuing the writ. It is enough that the Lancer appeal is now sub-judice because by the time the case will arrive here irreparable damage to affidant's tracing maritime lien claim will have occurred had appellate review of Judge Owen's final order resulted in the release of the Lancer proceeds to Prudential or General Electric beforehand.

17. It is not enough that prejudice might hopefully have been mitigated by the judicial notice afforded the panel in the Prudential-General Electric appeal in Docket 88-7589 by the facts stated in the Safir *amicus* motion since denied. The Lancer proceeds which are the subject matter of that appeal can only be protected for the benefit of this affiant's third-party interest as the holder of a priming maritime lien thereto by this Court's recognition of the linkage of the Writ of Mandamus to that appeal in its jurisdiction.

WHEREFORE, affiant prays this Court for a Writ of Man-

damus issued to District Court Judge Nickerson in aid of that appellate jurisdiction directing commencement of process by immediate summons to the defendants in District Court Docket 88-864 for the expedited hearing of the merit of the Safir claim as to that portion which represents a quasi-contract maritime lien and a remedy for unjust enrichment resulting from the proven violation of defendants' maritime wage differentail subsidy contracts or for such other relief as this Court finds appropriate.

/s/ Marshall P. Safir
MARSHALL P. SAFIR

Dated: January 9, 1989

Sworn to before me this
9th day of January, 1989

/s/ Margarete A. Vecchiarelli
NOTARY PUBLIC

MARGARETE A. VECCHIARELLI
NOTARY PUBLIC, State of New York
No. 30.4522259
Qualified in Nassau County
Commission Expires April 30, 1990

EXHIBIT F(3) TO LIU AFFIDAVIT

United States Court of Appeals
FOR THE SECOND CIRCUIT

DUPLICATE	:	89-8008
	:	*Docket Number*
IN RE MARSHALL P. SAFIR	:	NICKERSON EDNY/85 Civ. 0864
	:	**NOTICE OF MOTION**
	:	*state type of motion*
	:	for Leave to File Petition for
Use short title	:	Writ of Mandamus

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
JAN. 19 1989
ELAINE B. GOLDSMITH, CLERK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
FEB 21 1989
ELAINE B. GOLDSMITH, CLERK

MOTION BY: *(Name, address and tel. no. of attorney in charge of case)*

MARSHALL P. SAFIR, pro se
271 Grand Central Parkway
Floral Park, NY 11005
(718) 225-0210

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

GILMARTIN, POSTER & SHAFTO
SHEA & GARDNER
FOLEY HOAG & ELIOT
SIDLEY & AUSTIN
WEIL GOTSHAL & MANGES
FREEHILL, HOGAN & MAHAR
KOMINERS & FORT
(See Cert. of Service)

JUDGE EUGENE NICKERSON

Brief statement of the relief requested:

Mandamus for order to allow summons to be served and case to proceed to summary judgment.

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is denied

A TRUE COPY
ELAINE B. GOLDSMITH
/s/ Elaine B. Goldsmith
Clerk
2/21/89

/s/ Jon O. Newman
/s/ A. Kearse
/s/ Roger Miner

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	87 cv 5842 RO
		DOCKET NO.
Prud. Ins. Co. of Amer.	SS Amer. Lancer et al	PAGE___ OF___ PAGES

DATE	NR.	PROCEEDINGS	
3-15-90	191	Filed Claimant US Lines Inc. debtor & debtor in possession NOTICE OF MOTION FOR REARGUMENT RET: 3-30-90	PA
3-15-90	293	Filed Claimant US Lines Inc. debtor & debtor in possession memo of law in support for their motion for reargument.	PA
3-14-90	294	Filed order for compromising of claims of Margaret Sherrill . . . settlement of claimants claims against the proceeds from sale of deft Vessel SS Amer. Aqarius for the sum of $75,000.00.. clerk of court, on next rollover of funds held in registry of court, pay to Sherrill's attys sum of $26,224.12, balance of $48,775.88 be paid to order of M. Sherrill . . . intervening complt of M. Sherrill is dismissed with prejudice, each pty bear its own costs. . Owen, J. (copies of signed order to Rm 18 & Casheirs 14. cm	PA
3-20-90	295	Filed pltffs MEMO IN SUPPORT OF US LINES FOR REARGUMENT.	PA
* 3-16-90	—	Paid to Prud. Ins. of Amer. $620,344.8.	PA
3-23-90	296	Filed Notice that original record of appeal has been transmitted to the USCA 2nd cir.	PA
3-27-90	297	Filed pltffs intervenors John Sokolowski & F. Snell et al memo in opposition to motion for reargument by claimant US Lines.	PA
3-30-90	298	Filed Claimant US lines reply memo in further support of their motion for reargument.	PA
4-4-90	299	Filed pltffs Notice of change of firm name.	PA
*3-16-90		rec'd from MHTCO check in the amount of $75,000.00 & deposited into Registry of Co	
4-5-90		received check 268594 dtd 3-19-90 in the amount of $26,224.12 payable to Semel, Patrusky & Buschbaum.	PA

4-5-90		received check 268595 dtd 3-19-90 in the amount of $48,775.88 payable to Margaret Sherrill, adm. of estate of Ronald Sherill . . PA
4/18/90	300	Fld TRUE COPY OF MANDATE NOTICE OF MOTION FOR LEAVE TO APPEAL by Plaintiff Pro-Se MARSHALL P. SAFIR. . . Ordered that the motion be denied . . . SO ORDERED . . . CLERK, 2nd Cir. PM

Certified as a true copy on
this date 6-4-90
By /s/ R. Fugnetti
Deputy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

85 C 0864

Filed May 18, 1989

MARSHALL P. SAFIR,

Plaintiff,

—against—

UNITED STATES LINES, INC., LYKES BROS. STEAMSHIP CO., INC., MOORE MCCORMACK LINES, INC., AMERICAN PRESIDENT LINES, INC., FARRELL LINES, INC., AMERICAN EXPORT LINES, INC., PRUDENTIAL LINES, INC., PRUDENTIAL-GRACE LINES, INC.,

Defendants.

MEMORANDUM AND ORDER

MARSHALL P. SAFIR
Floral Park, New York
plaintiff *pro se*

WALTER, CONSTON & SCHURTMAN, P.C.
(William Schurtman, Esq. and Gregory F. Hauser, Esq., of counsel)
New York, New York
FOLEY, HOAG & ELIOT
(Verne W. Vance, Jr., Esq., of counsel)
Boston, Massachusetts
for defendants Farrell Lines, Inc. and American Export Lines, Inc.

KOMINERS, FORT, SCHLEFER & BOYER
(T.S.L. Perlman, Esq., and William H. Fort, Esq., of counsel)
Washington, D.C.
for defendants Lykes Bros. Steamship Co., Inc.

HAIGHT, GARDNER, POOR & HAVENS
(John W. McConnell, Jr., Esq., of counsel)
Washington, D.C.
for defendants United States Lines, Inc. and United States Lines (S.A.), Inc. (formerly Moore McCormack Lines, Inc.)

HAIGHT, GARDNER, POOR & HAVENS
(Richard G. Ashworth, Esq., of counsel)
New York, New York
for defendants Lykes Bros. Steamship Co., Inc., United States Lines, Inc. and United States Lines (S.A.), Inc. (formerly Moore McCormack Lines, Inc.)

SHEA & GARDNER
(Robert T. Basseches, Esq., and William R. Hanlon, Esq., of counsel)
Washington, D.C.
HILLS, BETTS & NASH
New York, New York
for defendants American President Lines, Ltd.

DAVID P. HOWE, ESQ.
New York, New York
for defendants Prudential Lines, Inc. and Prudential-Grace Lines, Inc.

NICKERSON, *District Judge*

Plaintiff moves to vacate, alter or amend an order of this court dated April 25, 1989 under Rule 59(e) of the Federal Rules of Civil Procedure.

In an opinion dated April 25, 1989 the court modified an earlier order to provide that plaintiff "is prevented only from commencing additional federal court actions relating in any way to defendants' pricing practices or merchant marine subsidies during the 1965-1966 period without first obtaining leave of the district court."

The court then denied plaintiff leave to file another action against defendants arising out of the same circumstances as the earlier suit.

Plaintiff has still failed to show why his current claims are different from the earlier action or why they have any merit.

Plaintiff's motion is denied. So ordered.

Dated: Brooklyn, New York
May 12, 1989

/s/ EUGENE H. NICKERSON
Eugene H. Nickerson,
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of August one thousand nine hundred and eighty-seven.

Present: HONORABLE JON O. NEWMAN
HONORABLE AMALYA L. KEARSE,
HONORABLE ROGER J. MINER,
Circuit Judges.

FILED
AUG 12 1987
UNITED STATES
COURT OF APPEALS
SECOND CIRCUIT
ELAINE B. GOLDSMITH
CLERK

IN RE: MARSHALL P. SAFIR, 87-3007
Petitioner.

MARSHALL P. SAFIR 87-4037
Plaintiff-Appellant,

v.

INTERSTATE COMMERCE
COMMISSION, ET AL.,
Defendants-Appellees.

O R D E R

Pending before the court are various matters arising from litigation brought to this Court by Marshall Safir, whose prior litigation history is summarized in *Safir v. United States Lines, Inc.*, 792 F.2d 19 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1323 (1987). On February 17, 1987, Safir filed a petition for review of a decision of the Interstate Commerce Commission in a matter captioned "Joint Application of CSX Corporation and Sea-Land Corporation under 49 U.S.C. [§] 11321." The ICC deci-

sion is dated February 11, 1987, and identified as Finance Docket No. 30900 (Sub-No. 1). The ICC decision resulted from an application to the Commission by CSX Corporation and Sea-Land Corporation for a determination that acquistion of Sea-Land by CSX would not violate the Panama Canal Act, 49 U.S.C. § 11321. The ICC's decision determined, among other things, that CSX and Sea-Land do not compete, that the transaction is not prohibited by section 11321, and that the applicants may consummate the transaction at any time. (ICC decsion at 13). The ICC officially issued its decision on February 24, 1987. The caption of Safir's petition for review also indicates that he is seeking a writ of mandamus. Though his papers are not entirely clear, it appears that he is attempting to challenge the ICC both by a petition for review, which alleges that it is legally incorrect, and by a petition for mandamus, which seeks an order requiring the Commission to exercise jurisdiction to an extent greater than Safir believes has occurred. Also on February 17, 1987, Safir filed with this Court a motion for a stay. Though the relief sought by this motion is also not clear, it appears to seek an order preventing the Commission from issuing its February 11, 1987, decision.

On May 7, 1987, the Commission filed with this Court a motion to dismiss Safir's petition for review for lack of jurisdiction. On May 11, 1987, CSX and Sea-Land (the latter now a wholly owned subsidiary of CSX) filed a motion with this Court to intervene as a respondent in the proceeding in which Safir petitions for review of the ICC decision.

On June 5, 1987, Safir filed with this Court a motion for a temporary restraining order. This motion seeks an order directed to the Bankrptcy Court for the Southern District of New York in connection with bankruptcy proceedings involving United States Lines, Inc. In the bankruptcy proceeding, CSX is seeking approval of the Bankruptcy Court to purchase most of the assets of United States Lines. Safir seeks an order

barring the Bankruptcy Court from approving the proposed sale of assets, pending disposition of Safir's petition to review the ICC decision concerning the CSX acquisition of Sea-Land.

Safir's motion, filed February 17, 1987, for a stay to prevent the Commission from issuing its February 11, 1987, decision, is DENIED as moot. That decision was officially issued on February 24, 1987.

The motion of CSX and Sea-Land to intervene in the proceeding in this Court in which Safir seeks a petition to review the decision of the Commission is GRANTED.

The motion of the ICC, supported by CSX and Sea-Land, to dismiss Safir's petition for review of the ICC decision officially issued February 24, 1987, is GRANTED. Safir has no standing to complain of the ICC decision concerning CSX's acquisition of Sea-Land. Safir's claim of standing, to the extent it can be discerned from his papers, is frivolous. To the extent he is claiming standing as a competitor of Sea-Land, that claim fails because Safir has not been in the shipping business for twenty years. The frivolousness of the claim is evident from its presentation despite the decision in *Safir v. Dole*, 718 F.2d 475 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984), rejecting Safir's challenges to the refusal of the Federal Maritime Administration to recover subsidies paid to various carriers; Safir was held to lack standing based on a claim of competitive injury. To the extent that Safir claims standign because of alleged monetary claims against various carriers, apparently including United States Lines, those claims have repeatedly been determined to be without merit. *See Safir v. United States Lines, Inc., supra*, 792 F.2d at 24.

Safir's motion, filed February 17, 1987, for a petition for mandamus is DENIED. This motion is as frivolous as his petition for review.

Safir's motion for a temporary restraining order directed to the Bankruptcy Court is DENIED. This motion is also patently frivolous. Safir has no standing to complain of any purchase by CSX/Sea-Land of the assets of United States Lines. Moreover, his effort to obtain relief from this Court concerning ongoing proceedings in the Bankruptcy Court, without seeking leave of the District Court for the Eastern District of New York, appears to be in violation of the injunction that was affirmed as modified in *Safir v. United States Lines, Inc., supra*, 792 F.2d at 23. That injunction prohibits Safir, without first obtaining leave of the District Court for the Eastern District of New York, from "instituting in any federal court, including bankruptcy courts, any new action, motion, petition or proceeding arising from or related to [United States Lines, Inc.'s and others'] pricing practices in 1965 and 1966 or their then receipt of merchant marine subsidies." It appears that Safir's ultimate point in trying to block the purchase of the assets of United States Lines is to aid his claim, repeatedly rejected by the courts, that he is entitled to monetary relief against United States Lines.

In light of the vexatious and harassing nature of Safir's litigation tactics and the frivolous nature of the pending matters, it is hereby further ORDERED that Safir show cause in writing to this Court within thirty days why he should not be enjoined from filing in this Court any appeal, motion, petition, or request for relief of any sort concerning in any way United States Lines, Inc., CSX Corporation, Sea-Land Corporation, or any person, company, or entity engaged in the transportation of goods by sea, without having sought and obtained leave of this Court for such filing.

It is further ORDERED that, as damages for frivolous litigation in this Court, Safir shall pay to CSX Corporation five thousand dollars ($5,000) within thirty days, Fed. R. App. P. 38,

and that the Clerk of this Court will accept no further papers from Safir in any matter (with the exception of the required response to the order set forth above requiring Safir to show cause why an injunction should not issue) until Safir furnishes satisfactory evidence of payment of this monetary obligation.

HONORABLE JON O. NEWMAN
HONORABLE AMALYA L. KEARSE
HONORABLE ROGER J. MINER
Circuit Judges.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of March one thousand nine hundred and eighty-eight.

Present: HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
HONORABLE ROGER J. MINER,
Circuit Judges.

FILED: MARCH 24 1988

87-3007
87-4037

IN RE: MARSHALL P. SAFIR,

Petitioner.

MARSHALL P. SAFIR,

Plaintiff-Appellant,

—v.—

INTERSTATE COMMERCE COMMISSION, ET AL.,

Defendants-Appellees.

ORDER

This Court's Order of August 12, 1987, as amended by Order of September 21, 1987, required Marshall P. Safir to show cause within thirty days why he should not be enjoined from fil-

ing further papers in this Court concerning parties and topics therein set forth, without having obtained leave of this Court for such filing. Though this Court's Order of August 12, 1987, was not stayed, Safir elected to postpone his response to the show cause order until the United States Supreme Court on January 25, 1988, denied his motion for rehearing of the Supreme Court's prior denial of his petition for a writ of mandamus. Safir filed his response to the show cause order on February 18, 1988, accompanying it with a request, purportedly pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, for an order vacating our Order of August 12, 1987. Though Safir's response to the show cause order may well be untimely, we have considered it on its merits and conclude that it provides no basis for withholding an appellate injunction, in view of Safir's history of pursuing vexatious litigation.

Accordingly, it is hereby ORDERED that Marshall P. Safir, his agents, employees, and attorneys are enjoined from filing in the United States Court of Appeals for the Second Circuit any appeal, motion, petition, or request for relief of any sort concerning in any way United States Lines, Inc., CSX Corporation, Sea-Land Corporation, or any person, company, or entity engaged in the transportation of goods by sea, without having obtained leave of this Court for such filing. This Order shall be filed forthwith, and the injunction shall be effective from the date of filing of this Order.

It is further ORDERED that Safir's request to vacate this Court's Order of August 12, 1987, is denied.

HONORABLE JON O. NEWMAN
Honorable Jon O. Newman

HONORABLE AMALYA L. KEARSE
Honorable Amalya L. Kearse

HONORABLE ROGER J. MINER
Honorable Roger J. Miner

Circuit Judges.

SHIPPING

Role of Commercial Fleet In Naval Sealift Debated

By WILLIAM DiBENEDETTO
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WASHINGTON — A moment of silence during a House hearing Tuesday perhaps illustrated the tension between plans to build up the nation's military sealift capability and the active merchant fleet's role in those plans.

Four key members of the Bush administration's naval and maritime policy team were asked about plans to revitalize the merchant marine.

They all looked sheepishly at each other and smiled. But no specific answer was provided to members of the House Merchant Marine and Fisheries Committee's Merchant Marine Subcommittee.

Testifying before the panel were the Pentagon's director of transportation policy, the head of the U.S. Transportation Command, the commander of the Military Sealift Command and the maritime administrator.

"Somewhere someone has to stand up and be a spokesman for the merchant marine," said Rep. Gene Taylor, D-Miss.

"We cannot afford to have the U.S. merchant marine as the weakest link in our armor of defense," asserted Rep. Walter B. Jones, D-N.C., chairman of the subcommittee.

Warren Leback, Marad's administrator, agreed, but when pressed for details about a revised subsidy program for U.S. carriers said: "We worked a full year in 1990 on a maritime reform program but were unable to achieve consensus with the industry. We're working on another program. I can't tell you when it will come forward."

His three companions stressed the importance of the U.S.-flag fleet's role in sealift operations during the Persian Gulf buildup and war.

They outlined plans to build or acquire 22 to 27 roll-on, roll-off ships for the Navy's fast sealift, Ready Reserve Force and pre-positioned fleets.

Gen. Hansford T. Johnson, commander-in-chief of Transcom, said commercial shipping, U.S. and foreign, moved 47% of all unit equipment hauled by sea to Saudi Arabia, with U.S.-flag charters carrying 20% of the total.

Projections that the U.S. dry cargo fleet will decline from the current 168 ships to 35 by 2005, if left unchecked, "will force us to re-evaluate the role the U.S. merchant marine can play in our national defense strategy," he noted.

"Expansion, modernization and maintenance of the RRF through Marad's budget will be increasingly critical," said Gen. Johnson.

Robert H. Moore, Defense Department director for transportation policy, said a sealift acquisition program will be submitted to Congress in June, an element of a larger mobility requirements study scheduled to be completed in November.

He said the secretary of the Navy recently "directed the development of an operational requirement for large, medium-speed, roll-on, roll-off ships and a phased program for acquisition of ships that are equally suited for a variety of employment modes, including maritime pre-positioning and reduced operating status."

He stressed the importance of a "balanced maritime program" that includes an adequate commercial fleet for "materiel sustainment requirements," a Ready Reserve Force and "readily available civilian mariners."

The idea of a merchant marine reserve, often mentioned as a possible solution to mariner shortfalls during the Desert Storm call-up, left a panel of labor leaders uncomfortable.

Terry Turner, director of the Seafarers International Union's congressional and government affairs department, said "such an initiative is better than no initiative at all.

"However, a more effective solution to our sealift needs would be a fully active commercial fleet." He spoke on behalf of the union's president, Michael Sacco.